TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 147.

HENRY LOCKHART, PLAINTIFF IN ERROR,

vs.

J. A. JOHNSON, JULIA A. JOHNSON, HIS WIFE, [illegible] PILKEY, ET AL.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

FILED [illegible], 1900.

(12,542.)

(17,542.)

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the supreme court of the Territory of New Mexico, Greeting: —

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the supreme court, before you, between Henry Lockhart, plaintiff in error, and J. A. Johnson, Julia A. Johnson, his wife; Charles Pilkey; The Unknown Heirs of Lee Walker, deceased; W. B. Childers, Edward W. Dobson, Charles Bousall, and The Washington Gold and Silver Mining Company, defendants in error, a manifest error hath happened, as it is said, to the great damage of the said plaintiff in error, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the Supreme Court, Territory of New Mexico.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 25th day of September, in the year of our Lord one thousand eight hundred and ninety-nine.

JOSÉ D. SENA,
Clerk of the Supreme Court of the Territory of New Mexico.

2 Original.

The United States of America to J. A. Johnson; Julia Johnson, his wife; Charles Pilkey; The Unknown Heirs of Lee Walker, deceased; William B. Childers, Edward W. Dobson, Charles Bousall, and The Washington Gold & Silver Mining Company, Greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States, to be holden at Washington, on the first Monday of October next, pursuant to a writ of error filed in the office of the clerk of the supreme court of the Territory of New Mexico, wherein Henry Lockhart was plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as — the said writ of error mentioned, should

not be corrected and why speedy justice should not be done in that behalf.

Seal of the Supreme Court, Territory of New Mexico.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 25th day of September, A. D. 1899.

WILLIAM J. MILLS,
Chief Justice of the Supreme Court of the Territory of New Mexico, etc.

On this 28th day of September, in the year of our Lord one thousand eight hundred and ninety-nine, personally appeared before me the subscribed, Sam. B. Gillett, and makes oath that he delivered a true copy of the within citation to William B. Childers and Edward W. Dobson, copartner- under the firm name of Childers & Dobson attorneys for all the defendants.

In witness whereof I have hereunto set my hand & seal this 28 day of September, A. D. 1899.

[Seal of Felix H. Lester, Notary Public, Bernalillo Co., N. M.]

FELIX H. LESTER,
Notary Public.

[Endorsed:] Service of a copy of the above citation acknowledged this the 28th day of Sept., 1899. W. B. Childers, attorney for defendants in error. Filed in my office this Sep. 29, 1899. José D. Sena, clerk.

3 TERRITORY OF NEW MEXICO,
County of Santa Fé, Supreme Court, } ss:

I, the undersigned, clerk of the supreme court of the Territory of New Mexico, do hereby make return to the within writ of error by transmitting to the Supreme Court of the United States a true copy of the record and proceedings in the said cause therein mentioned under my hand and seal of the supreme court of the Territory of New Mexico.

[Seal of the Supreme Court, Territory of New Mexico.]

JOSÉ D. SENA,
Clerk of the Supreme Court of the Territory of New Mexico.

Be it remembered that heretofore, on, to wit, the 23rd day of July, A. D. 1897, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a transcript of record; which said transcript of record is in words and figures as follows, to wit:

4 In the Supreme Court of the Territory of New Mexico, July Term, A. D. 1897.

HENRY LOCKHART *vs.* J. Q. WILLS ET AL. } No. 716. Error to Bernalillo County.

Transcript of Record.

Warren, Fergusson & Gillett, attorneys for plaintiff in error.
Childers & Dobson, attorneys for defendants in error.

5 The Territory of New Mexico to the district court of the second judicial district of the Territory of New Mexico, sitting within and for the county of Bernalillo, Greeting:

Because in the record and proceedings, and in the rendition of judgment in a certain cause lately pending before you, wherein Henry Lockhart was plaintiff and J. Q. Wills, H. C. Leeds, J. A. Johnson and Julia A. Johnson, his wife, Charles Pilkey, Samuel Dunlap, The Unknown Heirs of Lee Walker, deceased, William B. Childers, Edward W. Dobson and Charles Bonsall, receiver, were defendants, error has intervened, as it is said, to the damage of the said Henry Lockhart, and we being willing that such error if any there be, should be corrected, and speedy justice done in that behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send a copy of the record and proceedings aforesaid, to the supreme court of the Territory of New Mexico, together with this writ, so that you have the same in the said supreme court on the first day of the next term thereof, to be begun and held on the last Monday of July, A. D. 1897, at Santa Fé, in said Territory, in pursuance of law.

Witness the Honorable Thomas Smith, chief justice of the supreme court of the Territory of New Mexico, and the seal of said court, this 10th day of March, A. D. 1897.

[COURT SEAL.]

GEO. L. WYLLYS, *Clerk.*

6 I, O. N. Marron, clerk of the district court of the second judicial district of the Territory of New Mexico, do hereby certify that the foregoing writ of error from the supreme court of the Territory of New Mexico to the said district court of the second judicial district of said Territory, sitting in and for the county of Bernalillo, in the case wherein Henry Lockhart is plaintiff in error and J. Q. Wills, *et al.* are defendants in error, was caused to be lodged in my office by the said plaintiff in error, on the — day of —— 1897; and I further certify that in accordance with the command of the said writ, I herewith send a copy of the record, judgment and other proceedings had in said cause in the said district court, as the same appear of record in my office, to the supreme court of the Territory of New Mexico, together with this writ.

Witness my hand and the seal of said district court of the second

(Court Seal.) judicial district of the Territory of New Mexico, sitting within and for the county of Bernalillo, on this the 25th day of May, A. D. 1897.

O. N. MARRON, *Clerk.*

Be it remembered, that heretofore, to wit, on the twenty-first day of June, A. D. 1895, there was filed in the office of the clerk of the district court of the second judicial district of the Territory of New Mexico, within and for the county of Bernalillo, a declaration in a plea of ejectment, which said declaration is in the words and figures following, that is to say:

TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

7 In the District Court, Second Judicial District.

Henry Lockhart, the plaintiff in this action, by Warren, Fergusson and Gillette, his attorneys, by leave of the court first had and obtained, complains of James Q. Wills, H. C. Leeds, J. A. Johnson and Julia A. Johnson, his wife, Charles Pilkey, Samuel Dunlap, Lee Walker, William B. Childers, Edward W. Dobson and Charles Bonsall, receiver heretofore appointed by this court of certain property and premises called and known as the "Washington" lode or mining claim, situated in the Cochiti mining district, in the county of Bernalillo and Territory of New Mexico, defendants herein, of a plea whereof, they the said defendants, with force and arms, entered into the following-described premises.

And for cause of action plaintiff states and declares that heretofore, to wit, on the tenth (10th) day of July, A. D. 1893, the plaintiff was and is now entitled to the possession of a certain lead, lode, vein and deposit of mineral-bearing rock in place, and of a certain parcel of land including the same, described as follows, to wit:

A lead, lode, vein or deposit of mineral-bearing rock in place containing gold and silver, extending fifteen hundred (1,500) linear feet, together with three hundred (300) feet of surface ground along and on each side of said lead, lode, vein or deposit, and fifteen hundred (1,500) feet in length, situate in the Cochiti mining district, in the county of Bernalillo and Territory of New Mexico, and bounded and described as follows, to wit: Beginning at a monument of stones (monument No. 1); erected on said load, lead, vein or deposit of mineral-bearing rock at the northerly end thereof, and running

8 thence westerly three hundred (300) feet to a monument of stones (monument No. 2); thence running southerly fifteen hundred (1,500) feet to a monument of stones (monument No. 3); thence easterly three hundred (300) feet to a monument of stones (monument No. 4); thence easterly to a monument of stones (monument No. 5); thence northerly fifteen hundred (1,500) feet to a monument of stones (monument No. 6); thence westerly three hundred (300) feet to the place of beginning, and called and known as the Sampson mine.

A pine tree with the bark off on its south side being in the center of said piece or parcel of land.

And the plaintiff being so entitled, the said defendants, afterwards, to wit, on the twenty-third (23rd) day of October, A. D. 1893, entered into and upon said premises, and have from thence hitherto withheld, and now withhold from plaintiff, the possession of the same, to the damage of said plaintiff in the sum of fifty thousand dollars.

Wherefore plaintiff says that he is injured and has sustained damages to a large amount, to wit, fifty thousand dollars, and therefore he brings his suit and prays judgment for the possession of the said premises, and for fifty thousand dollars damages, and costs of suit.

HENRY L. LOCKHART, *Plaintiff.*

WARREN, FERGUSSON & GILLETT,
Plaintiff's Attorneys.

And thereafter on, to wit, the 26th day of June, A. D. 1895, there was made and entered of record in vacation, an order of the court, in the said cause, which said order is in the words and figures following, to wit:

9 HENRY LOCKHART *vs.* JAMES Q. WILLS ET ALS. } No. 4273. Ejectment.

Leave is hereby given to said Henry Lockhart to sue Charles Bonsall, receiver of this court in the action pending therein, wherein James Q. Wills is complainant and H. C. Leeds *et al.* are defendants at law and in equity, in respect of the property in the hands of said receiver.

Witness my hand at the county of Socorro, in the absence from this Territory of Hon. N. C. Collier, judge of the district court for Bernalillo county.

(Signed) H. B. HAMILTON,
Judge of the Fifth Judicial District for the County of Socorro.

An thereafter, on to wit, the 22nd day of January, A. D. 1896, there was filed in the office of the clerk of the said court in said cause, a plea of the defendants, which said plea is in the words and figures following, to wit:

In the District Court, Bernalillo County.

HENRY LOCKHART *vs.* J. Q. WILLS ET AL. } Ejectment.

Plea.

Now come the defendants in the above-entitled cause and say that the plaintiffs ought not to have or maintain his said action be-

cause they say they are not guilty of the matter alleged against them in the plaintiff's declaration and of this they put themselves on the country.

W. B. CHILDERS,
10 *As Attorney for Defendants and in His Own Proper Person.*
W. C. HEACOCK,
Attorney for Samuel Dunlap.

And thereafter at the same term of the said court, to wit, the March, 1896, term thereof, and on the nineteenth day of the said term, the same being March 23rd, 1896, the following proceedings, among others, were had and entered of record, to wit:

Present, as before.

HENRY LOCKHART
vs.
JAMES Q. WILLS ET AL. } No. 4273. Ejectment.

This cause having been heretofore heard by the court upon the motion of the plaintiff for a new trial herein, and the court having heard arguments of counsel as well for plaintiff as for said defendants, and the same having been taken under advisement by the court, the court being now fully advised in the premises, overrules said motion, and plaintiff excepted thereto.

It is therefore considered and adjudged by the court that the said motion for a new trial be and it is hereby overruled, and that the said plaintiff take nothing by his writ, that the said defendants go hence without day and recover from the plaintiff their costs herein and that execution issue therefor.

On to wit, the 11th day of February, A. D. 1896, there was filed in the office of the clerk of the said court in said cause an amended declaration, which said declaration is in the words and figures following, to wit:

11 In the Second Judicial District Court, Sitting within and for the County of Bernalillo and Territory of New Mexico.

Henry Lockhart, the plaintiff in this action, by Warren, Fergusson and Gillett, his attorneys, by leave of court first had and obtained files this his amended declaration, and complains of James Q. Wills, H. C. Leeds, J. A. Johnson and Julia Johnson his wife, Charles Pilkey, Samuel Dunlap, The Unknown Heirs of Lee Walker, deceased, William B. Childers, Edward W. Dobson and Charles Bonsall, receiver, heretofore appointed by this honorable court of certain property and premises called and known as the "Washington" lode or mining claim, situated in the Cochiti mining district in the county of Bernalillo and Territory of New Mexico, defendants herein of a plea whereof they the said defendants, with force and arms entered into the following-described premises:

And for cause of action plaintiff states and declares that heretofore, to wit, on the tenth (10) day of July, A. D. 1893, the plaintiff

was and now is entitled to possession of a certain mine, lead, lode, vein or deposit of mineral-bearing rock in place containing gold and silver, extending fifteen hundred linear feet in length northerly and southerly, in, along and through the center of a piece of land lying along and on each side of the said mine, lead, lode, vein or deposit of mineral, and extending three hundred feet on each side thereof, situate in the Cochiti mining district, in the county of Bernalillo and Territory of New Mexico, and bounded and described as follows, to wit: Beginning at a monument of stones (monument
No. 1) erected on said lode, lead and deposit, said monument
12 No. 1 being the north end monument of this claim, and being the center of the north end line of said claim; thence west 300 feet to a monument of stones (No. 2); thence south 1,500 feet to a monument of stones (No. 3); thence east 300 feet to a monument of stones (No. 4); said monument No. 4 being the south end monument of the center of the south end line of this claim; thence east 300 feet to a monument of stones (No. 5); thence north 1,500 feet to a monument of stones (No. 6); thence west 300 feet to place of beginning.

And for further description:

A pine tree with the bark off on the south side of said tree being in the center of said piece or parcel of land.

And the plaintiff being so entitled, the said defendants afterwards, to wit, on the first day of October, A. D. 1893, entered into and upon said premises and have from thence hitherto withheld and now withhold from plaintiff, the possession of the same, to the damage of the plaintiff in the sum of fifty thousand dollars.

Therefore plaintiff says that he is injured and has sustained damages to a large amount, to wit, fifty thousand dollars, and therefore he brings his suit and prays judgment for the possession of the said premises, and for fifty thousand dollars damages and costs of suit, etc.

WARREN, FERGUSSON & GILLETT,
Attorneys for Plaintiff.

And thereafter, on to wit, the 12th day of February, A. D. 1896, there was filed in the office of the clerk of the said office in said cause a plea of defendant Pilkey, which said plea is in the words and figures following, to wit:

13 TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

HENRY LOCKHART }
vs. }
JAMES Q. WILLS ET AL. }

Now comes the defendant Charles Pilkey and says that the plaintiff ought not to have and maintain his aforesaid action against him, because he is not guilty of the said supposed trespass alleged

in said declaration against him, and as to this the said defendant puts himself upon the country, etc.

CHILDERS & DOBSON,
Attorneys for Def't Pilkey.

And the plaintiff doth the like.

WARREN, FERGUSSON & GILLETT,
Def'ts' Att'y.

And for a further plea in this behalf the said defendant says that the plaintiff ought not to have and maintain his aforesaid action against him, because he says that at the time of the commencement of this action he was not in the possession of the premises described in plaintiff's declaration, or any part thereof, and as to this the said defendant prays may be enquired of by the country, etc.

CHILDERS & DOBSON,
Attorneys for Def't Pilkey.

And the plaintiff doth the like.

WARREN, FERGUSSON & GILLETT,
Pl'ff's Att'y.

And thereafter, on to wit, the same day, the same being the 12th day of February, A. D. 1897, there was filed in the office of the clerk of the said court in said cause the plea of all the defendants except the defendant Pilkey, which said plea is in the words and figures following, to wit:

14 In the District Court, County of Bernalillo, Territory of New Mexico.

HENRY LOCKHART
vs.
JAMES Q. WILLS ET AL.

Now comes the defendants in above-entitled cause and say that the plaintiff ought not to have and maintain his aforesaid action against them, because they are not guilty of the said supposed trespass alleged in said amended declaration against them; and as to this the said defendants put themselves upon the country.

CHILDERS & DOBSON,
Att'ys for Def'ts.

And the plaintiff doth the like.

WARREN, FERGUSSON & GILLETT.

And thereafter at a special term of the district court of the second judicial district of the Territory of New Mexico, begun and held within and for the county of Bernalillo, at the court-house of the said county on the first Monday of January, 1896, and on the thirty-third day of said term, the same being February 12th, A. D. 1896, the following proceedings, among others, were had and entered of record, to wit:

Present: The Honorable Needham C. Collier, associate justice of

the supreme court of the Territory of New Mexico, and judge of the second judicial district court thereof.

HENRY LOCKHART
vs.
JAMES Q. WILLS ET AL. } No. 4273. Ejectment.

At this day this cause is heard upon the demurrer of the
15 plaintiff to the second plea of the defendant Pilkey to the amended declaration herein, and the court after hearing arguments of counsel and being fully advised—

It is ordered and adjudged that said demurrer be and it is hereby overruled, and plaintiff excepts thereto.

And thereafter at a special term of the district court of the second judicial district of the Territory of New Mexico, begun and held within and for the county of Bernalillo, at the court-house of the said county, and on the 36th day of the said term, the same being February 15th, 1896, the following proceedings, among others, were had and entered of record, to wit:

Present: The Honorable Needham C. Collier, associate justice of the supreme court of the Territory of New Mexico, and judge of the second judicial district court thereof.

HENRY LOCKHART
vs.
JAMES Q. WILLS ET AL. } No. 4273. Ejectment.

Again come the parties and again come the jury and the trial of this cause proceeds, and the jury hear the evidence and at the conclusion thereof the court instructs the jury to find the issues for the defendants. Come now the jury and return into court the following verdict, to wit:

"We, the jury, under the instructions of the court find the defendants not guilty."

F. G. PRATT, *Foreman.*"

16 And thereupon the plaintiff files a motion for a new trial and on motion of said plaintiff by his attorney—

It is ordered by the court that the time for arguing and submitting said motion for a new trial be and the same is hereby extended and continued for thirty days.

In the District Court, Second Judicial District, County of Bernalillo, Territory of New Mexico, at Albuquerque Special January Term, 1896, for the Trial of Civil Cases.

HENRY LOCKHART
vs.
JAMES Q. WILLS ET AL. } No. 4273.

Hon. Needham C. Collier, judge of said court, presiding.

Suit in ejectment before jury duly empanelled.

Messrs. Warren, Ferguson & Gillett, attorneys for plaintiff; Messrs. Childers & Dobson, and W. C. Heacock, attorneys for defendants.

A. B. Reading, official court stenographer, duly sworn as such; and herewith transcript from stenographic notes taken by me, the said stenographer, of all the testimony given upon said trial, documentary evidence introduced upon motion for new trial, together with the opinions of the court instructing the jury to find for the defendants and overruling said motion for new trial, furnished counsel for plaintiff in duplicate and filed with the clerk of the court for the use upon appellate proceedings to be taken in said cause.

WEDNESDAY, 9.30 A. M., *February 12th*, 1896.

Commencement of Trial.

17 Judge Henry L. Warren, examining counsel for plaintiff, and Wm. B. Childers, examining counsel for defendants.

HENRY L. LOCKHART.

HENRY LOCKHART, the plaintiff, being duly sworn, testified as follows:

On direct examination he said:

Q. Will you state your name, residence and occupation?
A. Henry Lockhart; Albuquerque, N. M.; insurance and real estate.
Q. You are the plaintiff in this suit?
A. I am.
Q. Are you acquainted with one Charles Pilkey?
A. I am.
Q. Of course you know Benjamin Johnson.
A. I do.
Q. When did you first become acquainted with Pilkey?
A. In the spring of 1893.
Q. State where and under what circumstances?
A. Mr. Ben. Johnson brought a piece of rock or ore to my office and stated it had been given to him by a man by the name of Charles Pilkey.

(Objection.)

Q. Just state what you learned from Pilkey himself.

A. The first time I met Mr. Pilkey, to the best of my recollection, was in March or April, 1893; he stated that he lived at Pino Blanco or Cochiti; I do not recollect which point he made his home, both places being about identical. He stated that he was familiar with the mountains north of Cochiti and that from what he had learned from the native people he thought there was mineral there;
18 and I had already had tested a sample of mineral which he had brought from that country, or which had been given to him by some parties who found it there, and he had already had several conversations with Mr. Ben. Johnson of his statements made at that time and expressed a willingness to join.

(Objection unless statement made by Pilkey to witness.)

In the general conversation occurring at the time he expressed himself as having met Mr. Johnson frequently before, and the conversation was general in regard to the country. We questioned him in regard to the indications up there and the resources in a mineral way.

Q. Was that country known as a mineral country prior to that time to you?

A. Only in a general way we had—I understood it had been prospected previously to some extent but I had no personal knowledge of it. After we had talked matters over Mr. Pilkey expressed a desire and willingness to associate himself with us in a prospecting trip into that country, provided we would furnish the grub stake.

Q. What did that culminate in?

A. We made a verbal agreement between ourselves in which we were to have equally one-third interest in whatever Mr. Pilkey might discover. In further conversation over the matter he stated that he could get a hole or shaft sunk twenty feet at $1.50 a foot, and——

Q. That would be $30.00?

A. Yes, sir; and as that was a very low price in our estimation for that kind of work we told him to go ahead and make the arrangements. He said he could get this done by some of the people with whom he was acquainted in that vicinity. I asked him if
19 that was merely for their work or whether it included their supplies, that is, food, not mining supplies. He said it was for the work, that they would board themselves. I told Mr. Ben. Johnson who was present that it was a good contract to develop a claim, whatever claim it might be, cheaply. So we agreed on that point. Then Mr. Pilkey suggested, that as he was destitute of money and in straightened circumstances, that he would like to get the contract himself; we told him we would much prefer to give it to him, being associated with us, than to an outsider. Then I suggested, that as the matter had varied from our original agreement, it would be well enough to enter into a written arrangement so there would be no occasion for any dispute in the future. On that theory we drew up in pencil a memorandum of that agreement

which was agreed to by Mr. Pilkey, Mr. Johnson and myself. The agreement the next morning was reduced to writing and signed by all parties thereto.

Q. Will you look at this paper now shown you, identified as Exhibit 1, and state in whose handwriting the same is and in whose handwriting the signatures thereto are, respectively?

A. The agreement is in my own handwriting. My signature is written by myself, Mr. Johnson's by himself and Mr. Pilkey's by himself; it is witnessed by W. C. Heacock who wrote his name himself.

Q. All in your presence?

A. Yes, sir.

Q. At what time was that paper executed?

A. May 7th, 1893.

Counsel for plaintiff offers in evidence said original agreement or contract, above identified as "Exhibit 1."

20 2 p. m., same day.

Counsel for defendant- objects to the introduction of same, upon the ground that it seems to be a contract made about other matters and not binding upon any of the defendants unless it might be upon Pilkey.

The COURT: "Plaintiff may connect it."

COUNSEL FOR PLAINTIFF: "I take it the gentleman will hardly object when counsel states he will connect all the defendants."

COUNSEL FOR DEFENDANT-: "I object to the introduction of the contract offered in evidence on the ground that it is a contract that relates to surface-ground location of mines under the mining laws of the United States, which always implies the location of surface ground, while the amended declaration asks recovery for blind lodes in the ground and not for surface ground."

COUNSEL FOR PLAINTIFF: "The declaration is amended by leaving out that part of the declaration in the suit for surface ground."

COUNSEL FOR DEFENDANTS: "And the further objection, because the contract is between Pilkey, Lockhart and Ben. Johnson, and not between the plaintiff and the other defendants to the suit, and a suit in ejectment relates only to a question of possession or title, one or the other, and from the gentleman's opening speech (in presenting his case to the jury) I presume it will not be attempted to show any title to the locus sued for."

COUNSEL FOR PLAINTIFF: "Except title by prior possession."

COUNSEL FOR DEFENDANTS: "And therefore the prior contract made in May, 1893, has not anything to do with actual prior
21 possession, as I understand that to be the ground upon which recovery is predic-ted subsequent to that time. It is a question of fact utterly separate and distinct from any paper."

The COURT: "I suppose that to be matter of inducement."

COUNSEL FOR PLAINTIFF: "The declaration is not upon the surface ground or for any mining claim or lode under the laws of the United

States, but for some lodes and veins, and the declaration is amended in that particular."

The COURT: "The agreement is admitted, subject to objection, to avoid argument at this time."

Counsel for plaintiff then introduces said agreement, identified as "Exhibit 1," and same is read to the jury, and is as follows:

"EXHIBIT 1."

Articles of Agreement.

For and in consideration of the sum of one dollar to him in hand paid the receipt of which is hereby acknowledged, Chas. Pilkey, party of the first part, agrees with Henry Lockhart and Benjamin Johnson, parties of the second part, all of whom are residents of Bernalillo county, New Mexico, to enter into a partnership for the purpose of discovering, locating and operating mining claims.

The considerations of this agreement are that said first party shall prospect and locate such veins or lodes and placers as he may discover or know the existence of containing valuable ores or minerals in the name of and for the joint benefit of all the parties hereto; in the proportion of one-third interest to said first part- and an undivided two-thirds interest to said second parties.

The said second parties are to furnish the said first party
22 at their expense with the following articles and tools, viz:

Twenty-five pounds of giant powder, 100 feet of fuse, one box of caps, one hammer, — lbs. of drill steel and one pick, and when he shall have sunk or driven a shaft or tunnel four feet by six feet in a vein of mineral-bearing quartz to a depth of twenty feet from the lowest level of the surface at its mouth such vein and locality to be designated by said second parties, he shall receive in addition the sum of thirty dollars less any moneys for provisions or other articles except as above enumerated.

Said work to be begun within twenty days from the date of this agreement and prosecuted with due diligence to completion and to the satisfaction of said second parties. The said first party to furnish the second parties from time to time at their request samples of all ores and minerals discovered or taken out of any workings.

It shall be at the option of said second parties to continue working or abandon any claim located at any time they deem proper. This agreement to continue in force and effect for one year from its date all discoveries or locations made during that time by said party to be covered by this agreement. The said first party has no power to create any debt or make any contract binding the second parties to this agreement unless authorized to do so in writing by the said second parties. Any concealment of a discovery or failure to locate of a valuable mineral claim or claims for the purpose of evading the terms of this agreement and defrauding the said second parties shall work a forfeiture of any right or interest direct or indirect

that such first party might have or afterwards obtain to and for benefit of the said second parties.

23 Dated May 7th, 1893.

(Signed) CHARLES PILKEY. [SEAL.]
" HENRY LOCKHART. [SEAL.]
" BENJ. JOHNSON. [SEAL.]

Witness:
W. C. HEACOCK.

(Endorsed on back:) "Article of agreement. Charles Pilkey and Lockhart and Johnson." Also seal and certificate of recordation, signed by J. W. Harris, recorder, that same was filed for record on the 7th day of December, 1893, at 11 o'clock a. m. in vol. E of Mining Records of Bernalillo County, page 562.

Q. That agreement provides for the furnishing of certain articles and the payment of the sum of $30.00 for sinking twenty feet from the lowest rim; did that have reference to any particular claim?

A. It did, yes, sir. I do not recollect whether in the testimony before dinner I stated this was the first meeting I had with Mr. Pilkey or not. I would like to have that referred to because it was not the first time I met him when this agreement was drawn. The question, when I first came on the stand, was asked when was my first meeting with Mr. Pilkey and how I came to meet him, and I went on to state that Mr. Johnson gave me a piece of ore he got from Mr. Pilkey, and the counsel on the other side objected to that because Mr. Pilkey was not present, and if my recollection is right I referred to this agreement next, and I am not positive whether I said that was my first meeting with Mr. Pilkey or not; if I did so state it was incorrect, but I met him once or twice prior to this agreement.

24 Q. I understood you to say so before that you had met him once or twice before this agreement was drawn up and executed between you?

A. That is correct.

Q. My question is, whether the payment of $30.00 for sinking 20 feet from the lowest rim applied only to one claim or all such mining claims he might discover under that agreement on your behalf—which one?

A. That meant all money and the tools and other articles specified in that agreement applied for extra work to be done on each special location in that clause; it is covered in that clause.

Q. What one?

A. The claim afterwards located and called the "Mammoth"——

Q. Was there or not, subsequently, any other agreement than this written one between yourself and Johnson on the one hand and Pilkey on the other?

A. There was no special agreement except what is covered generally by that contract; it was a general grub stake agreement.

(Objection by counsel for defendant- on the ground that the agreement speaks for itself.)

Q. Go on and state what was done by the parties under this agreement, in evidence. (Exhibit 1.)

COUNSEL FOR DEFENDANT-: It is understood this is all subject to our objection.

A. In compliance with the terms of the agreement we furnished him from time to time material and supplies and paid expenses under the agreement amounting altogether to the sum of $211.00, more or less.

Q. What was done to your knowledge by Pilkey in furtherance of the agreement?

25 A. In pursuance of the agreement he located first the claim called the Sampson—oh, I mean the Mammoth; afterwards in conjunction with myself, while on a visit to him at the camp he located the claim called the Ellen L, another called Clear Creek, another called the Columbus; afterwards on the 10th of July the claim called the Sampson. In compliance with his contract he sunk a shaft on the Mammoth and afterwards did the location work on the Ellen L, in conjunction with which he was driving a tunnel through the vein on that claim.

Q. I do not care about the other matters; what do you know about this location by him of the Sampson?

A. He wrote in July or August that he had—(interrupted by objection, and witness instructed not to state the contents of any written instrument.)

Q. Don't state contents; have you got the letter?

A. Yes, sir.

Q. Please produce it.

A. Here is the letter (producing same.)

Q. Please look at this paper now shown you, identified as Exhibit 2, and state if you know in whose handwriting it is; if you received —, and when and how?

A. Yes, sir; it is in the handwriting, or, at least, received from Mr. Charles Pilkey and in his handwriting and signed by him.

Q. How did you receive it?

A. I received it through the mail in the latter part of July or the early part of August; the letter having no date I cannot specify the exact date.

Q. Received when?

26 A. Either in the latter part of July or the early part of August.

Q. What year?

A. 1893.

Q. Do you know Pilkey's writing?

A. Yes, sir.

Q. In whose handwriting is that letter?

A. In Mr. Pilkey's.

Counsel for plaintiff offers said letter (Exhibit 2) in evidence. Counsel for defendants objects to same upon the ground that it does not relate to the ground or whatever else is in controversy in this

suit. Counsel for plaintiff states that he expects to show that the letter relates specifically to the mine in question called the Sampson in this case. Counsel for defendants objects further because said letter was received after the date of the location of the Sampson mine and has no reference to that.

COUNSEL FOR PLAINTIFF: "That is what we expect to show. There is perhaps an ambiguity upon the face of the letter as to the specific location referred to, but that ambiguity we expect to show by other evidence is removed by the description contained in the letter itself, as well as by evidence outside of the letter connecting it with the property in controversy in this suit and we expect to follow it up."

The COURT: "I will let the letter go in evidence, subject, of course, to the principal objection to which all others are admitted."

Counsel for defendants excepts to the ruling of the court.

The COURT: "There is a principal objection to all of them, and such other objections as specially arise, and I will let this in over the special objection because of the promise of plaintiff to connect."

Same is introduced in evidence by plaintiff, marked "Ex-
27 hibit 2," and read to the jury, and is as follows:

"EXHIBIT 2."

COZA CANYON.

I send you some rock about seven feet lower than that you got when you were here. If you remember that seam that was in the middle of the—(Note by stenographer: The letter is in pencil and the next word written is "led," probably intended for "lead" or "lode" but appears to be stricken out by three lines drawn through the word, when the letter continues as follows:) It is all hard rock and looks to be filled with ore, the streak of ore are all through the ledge, the whole thing is getting to be more and more solid and went to locate the extension and located another that I think beats them all; it is over one thousand yards west of the canyon that we are working; I would like to have you come up in about a month; regards to Ben.

Yours,

(Signed) CHARLES PILKEY.

(Over on the other side of the sheet:) Send me some flour, ten pounds sugar, ten of coffee; that big pick is a dandy you bet; had plenty of rain.

Q. There is a reference in this letter: "And went to locate the extension and located another that I think beats them all; it is over 1,000 yards west of the canyon we are working. I would like to have you come up in about a month." Do you know what mine or claim is referred to by reference to location 1,000 yards west of the canyon that Pilkey was then working in for you and Johnson?

A. I do.

28 Q. What claim was it?

A. The Sampson claim.

Q. At the time this letter was written where was Pilkey working under his agreement with you and Ben Johnson?

A. He was working on the Mammoth.

Q. About how far is the Sampson from the Mammoth and in what direction?

A. It is about 1,000 yards in a westerly direction, perhaps northwesterly would be the better description.

Q. At the time you received this letter from Pilkey were there any samples accompanying it?

A. My recollection is there were, but samples as a rule came by express or were sent down by some parti-s; they sometimes came about the same dates with letters and very frequently at other times. Generally when they came there was a small paper enclosed with them distinguishing the location or point from which the samples came.

Q. Did you, or not, answer that letter?

A. I did; I answered all letters I received from him.

Q. What did you do with reference to the letter which you wrote him in reply to the one you have produced here?

A. I took a letter-press copy of it.

Q. What did you do with the original?

A. I mailed it to him.

Q. Did you pay the postage?

A. I did.

Q. To whom was it addressed?

A. Charles Pilkey, Pino Blanco, New Mexico.

Q. Postage paid, and deposited in the United States mail?

29 A. Yes, sir.

COUNSEL FOR PLAINTIFF: "There was a notice to the other side to produce the letters, and I will ask the defendants to produce that letter."

COUNSEL FOR DEFENDANTS: "We have an omnibus notice. We have not any original of which that is a copy; we do not admit we ever received any such letter as that (viz. letter-press copy which has been produced by witness).

Q. Did you make or take this impression from the letter which you have referred to as mailed?

A. I did.

Q. At what time with reference to your mailing it?

A. Immediately prior to mailing.

Q. And is this the impression upon page 76 of your letter-press copy book?

A. It is.

Counsel for plaintiff offers said letter in evidence.

Counsel for defendants makes same objection as to other letter; that it is irrelevant and immaterial and refers to a different mine and is not binding upon the defendants to this suit and in no ways tends to show possession of the locus in this suit.

Which objection is overruled by the court and counsel for defendants excepts to the ruling of the court.

Said letter-press copy of said letter referred to is then introduced in evidence, marked "Exhibit 3," taken from letter-press book of plaintiff on page 76 thereof, and is read to the jury, as follows:

"EXHIBIT 3."

AUG. 11.

Charles Pilkey, Esq., Pena Blanca, N. M.

30 DEAR SIR: Your samples of rock received. Have forwarded to Denver for assay. How much is there of the sample you sent wrapped up in the red paper that you said came from the seam? It looks very good. When you send down rock send larger pieces and more of them. You can send it by express, we will pay the charges at this end. You had better drive a large stake at the four corners of each claim and smooth off one side marking on it which corner it is and the name of the claim. It will be necessary to sink ten feet on each claim within ninety days after its location exposing mineral in place. When you write and send samples give the width of the vein and the pay streak that samples are taken from. Be sure and send large pieces for samples as we cannot get satisfactory assays from small ones. We shipped you a sack of flour, ten pounds of coffee and ten pounds of sugar yesterday. Will try and come when you have something good to show.

Very truly yours,

(Signed) HENRY LOCKHART.

Q. Did you receive any other letters from Mr. Pilkey with reference to this Sampson claim?

Counsel for defendants objects to question upon the ground that it assumes said letter from Pilkey refers to the Sampson.

COUNSEL FOR PLAINTIFF: "That is what we assume and we think we have connected this letter, and any other letter we may offer we propose to connect."

Objection overruled by court and counsel for defendants saves his exception.

A. I am not positive without looking over the correspondence; he very seldom referred to any special claim. I do not believe
31 he has named a claim in any letter he has written me.

Q. This letter of yours is dated August 11th, 1893, at that time had you visited this locality?

A. Yes, sir; I had.

Q. At what time and when?

A. Why, I visited the locality, if I recollect rightly, in June, this mining district you refer to I presume?

Q. Yes.

A. Afterwards in July.

Q. 1893?

A. Yes, sir. Afterwards the latter part of August.

Q. Where was Pilkey and what was he doing at the time of these several visits of yours?

A. He was living at a log cabin on the Mammoth claim on the north branch of the Colla cañon. The first time I visited the canyon he met me at Wallace and we both went up together and camped on what is now the location of the Ellen L. claim.

Q. At what date was that?

A. That was in May or June, either the latter part of May or early in June; I am not positive as to the exact date. It was before Mr. Pilkey had moved his family up there, however.

Q. What was he then engaged in doing?

A. At that time we went to look the ground over where he had made the first location.

Q. When was the second time you went up there?

A. The second time was early in July; possibly I may have made another visit prior to that but I do not recollect that I did.

Q. When was the next time?

32 A. The next time was the latter part of August or about the first of September.

Q. Of 1893?

A. Yes, sir.

Q. What was Pilkey doing at the time of that last visit?

A. At the time of the last visit?

Q. Tell the jury all that occurred.

A. At the time of the last visit he was working on the Mammoth.

Q. Where is the Mammoth situated with reference to the Sampson?

A. It is situated about 1,000 yards southeast or in an easterly direction.

Q. Did you see this Sampson ground?

A. Yes, sir, I did.

Q. Now just tell the jury all that occurred as between you and Pilkey.

A. I went up on this trip with Mr. Samuel N. Detrick for the purpose of more especially looking over this ground, to which he had referred in his letter and also to locate the proper place to do the work on the Ellen L. We arrived there about the middle or the latter part of the afternoon, at Mr. Pilkey's camp, and the next morning started out to examine this Sampson claim. We took along picks and went to where the location notice was first and examined the ground there and then followed the length of the claim to a point above the cabin.

Q. Who do you mean by we?

A. Mr. Pilkey, Mr. Detrick and myself, and in the course of the day we passed over what is now the Irish King and the Lone Star, arriving about opposite the cabin on the ridge about noon. Then we went to the cabin for dinner.

33 Q. You say you followed the lead; what lead do you refer to?

A. The lead on the Sampson claim. We agreed on the work to

be done on the Ellen L., the location, and I suggested he would have to hurry and get through with the work on that in order to have time to complete the work on the Sampson before the location would expire. He said he had found a soft place on the Sampson on the ledge in which he could do the work in a very short time, two or three days he stated, and that there would be no danger about it being too late or words to that effect.

Q. At that time was there any notice of location or claim upon this Sampson lead?

A. There was.

Q. Where was it?

A. There was a tree blazed on the south side, about the south side, above a pile of rock or stone built as a monument; the notice was tacked on that blazed portion of the tree.

Q. Do you know where that notice is?

A. I do not.

Q. Have you got any copy of it?

A. I have.

Q. Please produce it. (Same produced by witness.)

Q. Will you please look at this paper now shown you, marked Exhibit 4, and state in whose handwriting it is and when and where you received it?

A. I am not positive in regard to the handwriting, but I am positive I received it from Mr. Pilkey.

Q. I thought you stated you knew Mr. Pilkey's handwriting?

A. I do; but I do not think this resembles it.

Q. You say he gave it to you himself?

A. Yes, sir.

34 Q. At what time and place?

A. During the visit on the first of September, or thereabouts.

Q. Under what circumstances?

A. I do not catch the idea.

Q. Under what circumstances did Pilkey hand it to you?

A. He handed it as a copy of the location notice he had placed on the Sampson.

Q. Where was the notice you have referred to posted, upon a tree or in the monument you referred to?

A. To my best recollection it was posted on the tree.

Q. Where were you when Pilkey gave you that copy of it?

A. He gave me this copy at the cabin.

Q. After you had visited the Sampson location and returned to the cabin?

A. Yes, sir.

Q. What, if anything, did he say with reference to it being a copy of the notice posted upon the claim?

A. Nothing especially, more than he stated this was a copy of the location notice he had placed on the Sampson. I will state that a portion of the correspondence with Mr. Pilkey, I believe—perhaps that is not evidence, my belief; it was in Mrs. Pilkey's handwriting I should judge.

Objection.

Q. That is not the question now. For what purpose did Pilkey give you that paper purporting to be a copy of the notice posted on the Sampson claim?

A. For the purpose of showing it was properly located, that Mr. Johnson and myself were both on the location notice.

35 Counsel for the defendants objects, unless Pilkey made such statement to witness.

A. I do not say he used that language at all.

Q. What, if anything, did he say when he gave you that copy?

A. I could not give his exact language at this time.

Q. No—the substance of it.

A. It was simply a copy of the location notice which he had placed on the Sampson.

Counsel for plaintiff offers Exhibit 4 (copy of location notice) in evidence.

Counsel for defendants object upon the ground that it is irrelevant, shows no possession in itself, is not an act of possession as against these defendants and not binding upon defendants.

The COURT: "I think it can go in."

To which ruling of the court counsel for defendants except.

Same is read to the jury, and is as follows:

"EXHIBIT 4."

The undersigned —— —— citizens of the United States over the age of twenty-one years, having complied with all the req[illegible]nts of the United States and territorial laws now in force relati[illegible] to mineral locations, and with all local customs and regulations in force relative to such locations, ha- located and do- hereby claim the right of discovery and location, fifteen hundred (1,500) lineal feet on and along this lode, vein, deposit of mineral bearing rock in place, together with three hundred (300) feet of surface ground along and on each side of said 1,500 feet. The claim hereby located is situate in the Cochiti mining district, county of Bernalillo, Territory of New Mexico, and is more particularly described as follows:

36 Begin-ing at a monument of stones (monument No. 1) erected on said lode, lead and deposit: said monument No. 1 being the north end monument of this claim, and being the center of the north end line of said claim: thence west 300 feet to a monument of stones (No. 2); thence south 1,500 feet to a monument of stones (No. 3); thence east 300 feet to a monument of stones (No. 4), said monument No. 4 being the south end monument and center of the south end line of this claim; thence east 300 feet to a monument of stones (No. 5); thence north 1,500 feet to a monument of stones (No. 6); thence west 300 feet to the place of beginning.

And for further description the lode is of grayish quartz from three to five feet wide and can be traced for 1,000 yards. Dips into the mountain.

This claim was located July 10, A. D. 1893, and shall be known as the Sampson mine. A copy of this notice is placed on monument No. — in center of claim by a pine tree with bark off on the south side.

CHAS. PILKEY,
BEN. JOHNSON,
HENRY LOCKHART, *Locators.*

Notice posted on claim in presence of—
ADA PILKEY,
LEE DUDLEY, *Witnesses.*

(Endorsed on back:) Notice of mining location. Name of claim, "Sampson." Name of locators, Charles Pilkey, Ben. Johnson, Henry Lockhart. Filed for record this — day of ——, A. D. 189–. ——, recorder. Territory of New Mexico, county of Bernalillo. This instrument was filed for record on the 9th day of December,
37 1893, at 11 o'clock a. m. Recorded in vol. F of Mining Records of said County, folio 7. J. W. Harris, recorder.

Q. At the time you speak of, when this copy of the notice was handed to you by Pilkey, what had Pilkey done or what was he doing with reference to the lead described in the notice?

A. He had put up a monument of stone referred to, location notice, but at that time he had done no work on the claim.

Q. That was the latter part of August or the first of September?

A. About the first of September.

Q. State what, if anything, was said between you and him with reference to complying with the mining laws or regulations as to sinking a hole and recording this location notice and marking the boundaries.

A. I had previously written him distinctly in regard to (interrupted)——

Q. Never mind about what you had written him. At this time state what passed between you and him on that occasion.

A. I called his attention to the necessity of locating the claims properly and doing the work within the specified time; we examined the ground, picked it over and broke some of the rock, and he, in answer to my suggestion in regard to the necessity of doing the work in time, stated specifically in regard to that claim that he knew of a soft place on it where leads cropped up and he could get a 10-foot hole down from the top of the ledge with very little work.

Q. And what with reference to doing it before October 10th? (Objection as leading.) Please state all that Pilkey said on that occasion with reference to complying with the requirements
38 of the law and to this claim within the time required by law?

A. He said he would have the work done all right in time?

Q. What work?

A. I do not pretend to give his exact language because I do not remember, I give the substance of our understanding in regard to those matters.

Q. That is enough: That he would have what work done in time?

A. The location work.

Q. Was anything said as between you and him as to what work was required to be done?

A. I do not know that there was at that time for the reason that I had explicitly stated to him prior to that time the necessary work and matters to be attended to in connection with the proper location of the mining claim.

Q. Do you mean in that letter of August 11th, 1893, which you have produced here?

A. I do.

Q. Well, in stating that he would have the work done all right to what did he refer if you know?

Objection as leading, and that the witness should state what was said.

The court tells the witness to state the language as near as he can that was used.

A. In reference to the work the conversation took place on the Sampson claim and all talk with reference to work or anything else that occurred referred to that claim, and I distinctly recollect from the fact that I anticipated it would take considerable time in September, if not nearly the entire time to complete the work mapped out on the Ellen L., he would have very little time to do the work on the Sampson and I desired to impress on his mind that
39 that work would have to be done prior to the time of the expiration of the location notice. That brought up his statement in regard to having found a place on the claim where he could do the work so readily.

Q. You say that you went up and down the lead, yourself, Pilkey and Deidrick; what lead do you refer to?

A. The Sampson lead.

Q. Did you go over its whole length?

A. I did.

Q. What do you say as to this copy of the location notice which you say you saw posted upon the lead, being a copy of the notice that was posted upon the lead at that time?

A. I say it is a correct copy.

Q. Were you up there afterwards, after the first of September, whilst Pilkey was still in possession?

A. Not while he was in possession for us.

Q. Did you look for the notice that had been posted there?

A. I did.

Q. What became of it?

A. I do not know.

Q. Was it there?

A. It was not.

Q. I observe that this location notice purports to have been recorded on December 9th, 1893; please state who had it recorded.

A. I had.

Q. And why it had not been previously recorded?

A. I had it recorded. It had not been recorded prior to that date for the reason that we had received no notice from Mr. Pilkey that he had performed the labor as required by law.

40 Q. What was the agreement or understanding between yourself and Mr. Pilkey with reference to giving notice of the performance of the location work prior to recording?

A. The understanding was that when he had located claims and done work he should forward copies of location notices for record. This location notice having been made out at the time of my visit I took a copy with me and told him to notify me when the work was completed.

Q. What work?

A. On the Sampson.

Q. Well, tell the jury what work was referred to by the work?

A. Location work, consisting of a ten-foot hole or shaft that is under the law, as I understand it, the work required is a ten-foot—either ten feet in depth or a tunnel the face of which shall be a ten-foot hole, the upper cropping of the ledge, exposing mineral in place.

Q. Did you observe any corner stakes or monuments upon the ground?

Objection as leading and sustained.

Q. Please state what you saw else upon this claim with reference to appropriation or possession of it.

A. Well, as to that question I will say, I didn't see any corner stakes.

Q. What if anything was said by Pilkey with reference to it?

A. Nothing was said by Mr. Pilkey with reference to corner stakes; I didn't look for any corner stakes, therefore I cannot say they were there or not; I didn't see any.

Q. Who was in possession of the mine or lead at that time?

41 A. Mr. Charles Pilkey.

Q. Under what claim or right?

A. Under a location made in conjunction with Mr. Benjamin Johnson and myself.

Q. Was possession afterwards taken of this lead by any one else that you know of before this suit was brought?

A. Yes, sir.

Q. By whom and when?

A. By Frank Fagaly, Lee Walker, Hub Leeds and J. A. Johnson.

Q. Do you know under what claim or right they so took possession?

A. I do not.

Q. Do you know at what time they took such possession?

A. Well—(Counsel for defendant-: "Of your own knowledge.") Of my own knowledge I could not say more than the location notice on record shows that was the 23rd of October, I believe.

Q. 1893?

A. 1893.

Q. Up to that time had there been any other person in possession or claiming possession of this lead known as the Sampson other than Pilkey?

A. There had not.

Q. When did you receive any notification from Pilkey after that visit there when you received this location notice as to the performance of the location work by him?

A. I never received any notice.

Q. What connection had the failure to receive that notice with your failure to record the notice?

COUNSEL FOR DEFENDANTS: "I object; let him state what
42 he did. His reasons are not subject to explanation of that kind."

Objection sustained by the court, and counsel for plaintiff excepts to the ruling of the court.

Q. Now you say you saw this property after possession had been taken by these parties you have named: What can you say to the jury as to the property being the same that was included in the Pilkey possession of the Sampson?

A. It is practically the same, the original—now I cannot state as to my own knowledge as to the original lines but the amended location notice on the Washington varies on the north end a little from the south lines of the Sampson. The Sampson was a parallelogram the sides of which were in a straight line with each other. The Washington follows the same lines on the south but swerves slightly to the west on the north—well, perhaps half or one-third—so that the side lines are not exactly parallel at that point with the side lines of the Sampson.

Q. You are speaking now of the lines of the surface location?

A. Yes, sir.

Q. How about the lead itself?

A. The lead and vein itself are identical.

Q. Of which Pilkey was in possession and of which these parties you have named subsequently?

Objection.

A. Yes, sir.

Objection because witness is not testifying about possession but about the location notice.

The COURT: By possession you mean as evidenced by the location notice? Is that right? You say you only knew of their having possession from the fact of that recorded location notice?

43 A. Also by the men being there, Mr. Walker, for instance, who was on the ground when I made this visit and——

Q. What Walker?

A. Lee Walker, and another man who was employed there as watchman.

Q. By whom?

A. By the Washington people.

Q. That was your last visit?

A. No, that was not my last visit; it was my first visit after the location had been jumped. I went up the trail on the Lone Star and I met this man who was in charge of the property as watchman. He said that he had orders to prevent any person from coming on the ground.

Q. This was after October 23rd you are speaking of?

A. Yes, sir.

Q. I am asking you about the last visit at the time Pilkey was there under his contract with you: How did that lead of mineral which was then pointed out to you and which you say you went up and down with Pilkey and Deidrick correspond with the lead in possession as you say of these subsequent parties?

A. The two leads are identical.

Q. Describe that lead to the jury.

A. Well, it is a ledge of rock cropping out on the ground at this particular point near the location notice. At that time some were above the surface. In the vicinity of the location notice and south of it the ground was covered with float, that is small portions of rock broken from the ledge through natural causes; further south there was a very extensive porphyry dike with cropping above the ground for a long distance. On the south it was quite heavily
44 timbered and most of the ground in that direction to a great extent was covered with alluvial soil.

Q. What sort of rock was this that cropped out?

A. Porphyry and quartz.

Q. What sort of quartz in color?

A. It is a sort of grayish quartz; all quartz in that country is about identical; some of it is honeycombed and from the oxidizing of the iron it becomes a redish tint. Where it is not oxidized it is calculated to be gray or white.

Q. How did it correspond with the description contained in the location notice posted by Pilkey?

A. The description corresponds very fairly.

Q. What acts of ownership, if any, were performed by Pilkey during the time of his possession under this notice?

COUNSEL FOR DEFENDANT-: "What you know."

A. His statements to me I suppose are admissible?

Q. Yes.

A. He stated that he had located it in his letter; afterwards when on the ground with Mr. Deidrick (or Detrick) and myself showed us the monument and location notice, where he had blazed the tree on the south side, followed the vein along and examined the quartz and rock.

Q. How?

A. By breaking it with picks.

Q. Had there been any assays of the rock made at that time?

A. I would not be positive in regard to whether any assays had

been made at that time. He had a good many assays made. Afterwards I had a piece of rock I brought down myself assayed.

Q. Where did you obtain that piece you brought down?

45 A. From the Sampson.

Q. Did you recevie it from anybody or take it yourself?

A. I took the piece I had assayed myself.

Q. About what time?

A. About the first of September. Possibly a day or two prior; that was about the time of my visit; I do not know the exact date.

Q. Have you a certificate of the assay?

A. No, sir, I have not.

Q. You have stated, I believe, that at the time of that visit about the first of September there was no other person except Pilkey in possession or claiming this lead?

A. There was not.

Q. When did you first learn that there was any adverse claim to the possession of that lead made by any one?

A. I would not be positive as to the exact date, but it was after the 10th day of October.

Q. How and in what manner did you learn it?

COUNSEL FOR DEFENDANTS: "I object unless he knows it himself."

The COURT: "He can answer the question: Do you mean from what source?"

COUNSEL FOR PLAINTIFF: "Yes, sir."

A. It did not come to me direct from any of these defendants.

Counsel for defendants objects and moves to strike out answer.

Q. Did you ever learn there was adverse claims set up to these leads by any of these defendants?

A. I did.

Q. How did you learn it?

46 A. The first positive proof that I had was I believe the location notice, that is if my knowledge has to come from some of the defendants or from personal observation.

Q. Yes, sir.

Q. Now please state what you had done with reference to compliance of the agreement of yourself and Benjamin Johnson with Pilkey in regard to this claim in question, in reference to the compliance with the agreement with Johnson and Pilkey.

Same objection by counsel for defendants; overruled and exception.

A. We complied with all the terms of the agreement.

Objection—conclusion of law; and the court instructs witness to state what he did.

A. We supplied him with provisions as required, tools, powder and in addition to that we gave him money, which was not required under our agreement.

Q. Please state specifically what you had paid him and what you had supplied him with?

A. Well, I have a book here, will that do to refer to?

Q. Yes.

The COURT: Do you refer to the book to refresh your memory?

A. Yes, sir.

Q. Were these entries made at the time of their respective dates in the book?

A. They were made on the date of the entries as far as the bills were received. Sometimes Mr. Johnson would pay out money and not report it to me for perhaps some days afterwards. When he reported it then I would make an entry of it. The books are original entries as far as the transactions first came to my knowl-
47 edge, that is those which I did not perform myself.

Q. Well, will you refer to the entries in that book (the witness' ledger book) and state whether or not they are correct or not.

A. They are correct, yes, sir.

Q. Are any of the payments that appear in that book of account evidenced otherwise than by the book itself?

A. Yes, sir, they are.

Q. Will you refer to the first entry there, seriatim, and follow on down?

A. The first entry is "To assay at Socorro, $2.00; May 8th."

COUNSEL FOR DEFENDANTS: "I would like to see the book. And object to his reading it off. I do not think he is qualified to read the items off that way."

Same shown to jury.

A. Only that first page refers to this transaction; the rest has nothing to do with it.

COUNSEL FOR DEFENDANTS (after examining book): "It does not purport to be an account with Pilkey and is a continuing account relating to other matters as well as this."

A. It entirely relates to that account until the second page, and in the center of the page you will notice it refers to another account; the first two pages relate exclusively to transactions between Pilkey, Johnson and myself.

Q. Some of these entries are not based upon your own knowledge nor were the entries made at the time; can you separate the items as contained in that book, those which you yourself made and were made contemporaneously with the dates from those which were made upon representations made to you by Mr. Johnson?

48 A. Yes, sir.

Counsel for defendants withdraws objection to witness reading from book.

The COURT: I understand so far as acts performed by yourself were concerned the entries were made on the date of the transaction?

A. To the best of my recollection; in fact most of the items are contained in bills here which are originals.

Counsel for defendants withdraws his objection if the witness testifies to such entries as he made himself.

A. The first item "To assay at Socorro" I paid for, "2.00." Second item "May 8th, hardware, Mandell Bros., $17.07" I paid for. The third item "May 9th, groceries, Pratt & Co., $12.00"——

COUNSEL FOR DEFENDANTS: Just mark with a check those items you are identifying as having paid yourself so I can know what they are.

Witness does so, as is shown by a pencil check-mark in said ledger and upon typewritten copy identical with entries in ledger, and which is hereto subjoined, under the heading, as contained in said ledger referring to account in this suit, "Cochiti Mining Company."

A. "June 5th, assay, Burlingame, $4.00"——

Q. All 1893?

A. Yes, sir.—"June 10, assay, Burlingame, $4.00." "June 15th, assay, Burlingame, $2.00." "June 28th, assay, Burlingame, $4.00." "June 27th, cash, Lockhart to Pilkey, $15.00." "June 27th, provisions, Maloy, $16.35." I beg pardon, that was paid by Mr. Johnson.

Q. Just mark with a pencil "J" opposite that; (which however seems not to have been done, but same is distinguished by not having the pencil check-mark in front of the item as in the others above testified about.)

49

A. Let me look, I will not be positive about that. (Witness looks through original store bills in his possession that were rendered to him, supposably.) As a matter of fact all the bills were paid by me but ordered in some instances by Mr. Johnson, but paid by me simply because I kept the account. In some instances he would pay for them and bring the account up and I would pay him. At any rate I think that was paid by him and I will skip it.

Q. Skip those items and not mark them at all. Which is done; that is, they are not identified with the check-mark, but are not marked with a "J" as again suggested by one of the counsel.

A. "June 27th, express and postage, Lockhart, $1.00." "July 6th, assay, Burlingame, $2.00." "July 6th, Henry Lockhart expense to mines, $4.00." "July 17th, provisions, Ilfeld Bros., $8.64." Same date, "hardware, E. J. Post & Co., $10.70." Same date, "cash, Lockhart to Pilkey, $10.00." "July 17th, sundries, $3.85." I will state that refers to small details such as saws, hammers and such things as that kind. "July 19th, Albuquerque Foundry and Machine Co., castings, $5.00." Same date. "saw, 50 cents." Same date, "freight, 25 cents." "August 9th, freight, 25 cents." Same date, "E. E. Burlingame for assays, $2.00." Same date, "Harris, assays, $3.00." "August 14th, one box of caps, 85 cents." Same date, "beans, apples and freight, $2.15." Same date, "expressage,

25 cents." Same date, "freight, $1.00." "Paid Harris for assays, $1.50." "August 25th, paid Harris for assays, $6.00." "E. E. Burlingame, $2.00." "August 15th, E. J. Post & Co., rope, $7.20." "August 16th, Mandell Bros. & Co., $10.00;" that was for powder. "September 1st, expenses to mine, $7.50." "September 6th, to wages for boy to Pilkey, $8.00." "September 9th, Wm. Harris, assays, $6.50." "Recording location notice, $3.00, September 30th." "Wm. Harris, assays, September 13th, $3.50." That was paid on October 6th, the assays were made September 13th. "December 9th, recording location notice, $2.00." "Recording agreement, $1.50." That is all.

Q. To whom were these various items of money and supplies furnished, and upon what account?

A. They were all furnished or paid on the account of what we designated for the sake of keeping the account "Cochiti Mining Company," consisting of Charles Pilkey, Ben. Johnson and myself.

Q. In furtherance of what agreement, if any?

A. Of the agreement entered into with Pilkey on May 7th, 1893.

(Here follows typewritten copy of "Cochiti Mining Company.")

Q. When were the last supplies of goods furnished by yourself and Johnson to Pilkey?

A. September 15th, 1893.

Q. What did they consist of?

A. That was the date they left here; they consisted of one sack of flour, 50 pounds; 25 pounds of bacon and $1.00 worth of sugar, some baking powder, salt,—I ain't clear; my recollection is there was 10 pounds of coffee, but I ain't certain about that without referring to the bill.

Q. Have you the bill?

A. I have.

Q. The freight bill or the bill from the merchant?

51 A. I have the bill from the merchant and a record of the freight bill.

Q. Have you the bill for that last shipment of goods you have spoken of, Mr. Lockhart?

A. I believe so.

Q. Will you please look and see?

A. Here is a bill for a portion which was shipped by Mr. Maloy.

Q. Part of that last item you read, part of the last shipment?

A. Part of the last shipment. It is not part of the last shipment I made here, because this shipment was ordered by Ben. Johnson for Charles Pilkey.

Q. Have you any freight bill?

A. The freight bill—it was shipped by Mr. Maloy and the freight bill, of course, went to him. I went to the depot and got a record of the freight bill and also sent to Mr. Sands the agent at Wallace and got a record of the receipt and delivery of the goods at that point——

Counsel for defendants objects: "I object to these things; if you

have a record would like them produced. And I move that evidence be stricken out."

(There was no ruling one way or the other, counsel for plaintiff continuing with the examination.)

Q. What was the shipping point on the railroad for this mine?

A. It was known at that time as Wallace, now Thornton.

Q. And from there how far across to this Sampson mine?

A. It is estimated to be about 25 miles.

Q. What was the means of communication between Wallace, or Thornton, and the mines?

A. At that time a wagon road extended up Pena cañon
52 and was passable for about three or four miles above the mouth of Pino cañon or what is now called the town of Allerton. From the wagon road to what was known as the Sampson mine there was a trail probably three miles, possibly more and possibly less, but about that.

Q. Under what belief was this agreement and the subsequent possession taken by Pilkey of this mine in reference to the mine being located upon public lands or otherwise?

A. It was under the belief at that time it was the public domain. When Mr. Pilkey came down to consult with us in regard to prospecting up there I asked him particularly in regard to whether he was positive as to whether it was on or off the grant. He said he was positive it was above the grant line, that is further north than the Cochiti grant.

Q. What grant line was referred to?

A. Well I referred at the time to any grant, or anything except the public domain; we were desirous of not doing any prospecting except on the public domain.

Counsel for plaintiff offers in evidence in this connection the stipulation between the parties to this suit, and the same is introduced in evidence and read to the jury, identified as Exhibit 5, and introduced as "Exhibit 5," which is as follows:

"EXHIBIT 5."

In the District Court, County of Bernalillo, Territory of New Mexico.

HENRY LOCKHART
vs.
JAMES Q. WILLS ET AL. } No. 4273.

Stipulation.

It is stipulated and agreed by and between the plaintiff and defendants in above-entitled cause that the premises in contro-
53 versy in this case are situated within the limits of private land claim reported as number 135 in the office of the surveyor general of the Territory of New Mexico, known as the Canada de Cochiti tract, as said claim was surveyed by the surveyor general, said survey having been made and approved by Clarence Pullen, surveyor general, on the date of June 29th, A. D. 1885.

It is further stipulated that said private land claim was never confirmed upon report of the surveyor general, but two petitions for the confirmation of the same *was* filed in the court of private land claims, one by Joel Parker Whitney, Jose Juan Lucero, Lauriano Lucero, Juan Cristoval Lucero, Jose de Jesus Lucero, Juan Teodora Lucero, Jose Telesforo Lucero, Bernard S. Rodey, and Hannah Harris, being numbered 205 on the docket of the court of private land claims at Santa Fé, and filed March 2nd, 1893; and the other petition being filed by Manuel Hurtado and Jose Antonio Gallego on the 3rd day of March, 1893, and that said petitions were consolidated in said cases heard, and decree of confirmation rendered by said court on the 29th day of September, A. D. 1894, a compared copy of which decree is attached to this stipulation.

It is further stipulated and agreed that the said premises in controversy in this case are not included within the boundaries of said grant as confirmed by said decree.

It is further stipulated and agreed that an appeal was taken from said decree by all of the said petitioners to the Supreme Court of the United States, in which court said cause is now pending upon said appeal and undetermined, said appeal being dated the 11th day of March, A. D. 1895.

54 It is further stipulated and agreed that the official printed copies of the reports of the surveyor general to Congress upon said private land claim and all documents attached thereto may be used upon the trial of this cause to the same effect as if they were the original documents and archives on file in the surveyor general's office, subject, however, to such objection as the parties may make upon other grounds.

WARREN, FERGUSSON & GILLETT,
Plaintiff's Attorneys.

CHILDERS & DOBSON,
W. C. HEACOCK,
For Defendants.

(*Present Proceedings before Surveyor General as Officially Published.*)

UNITED STATES OF AMERICA, *ss:*

In the Court of Private Land Claims of the United States, Santa Fé District, Territory of New Mexico, August Term, A. D. 1894.

Present: Hon. Joseph R. Reed, chief justice, and also all the honorable associate justices.

JOEL PARKER WHITNEY, JOSE JUAN LUCERO, LAURIANO Lucero, Juan Cristoval Lucero, Jose de Jesus Lucero, Juan Teodoro Lucero, Jose Telesfero Lucero, Bernard S. Rodey, and Hannah Harris, Petitioners,
vs.
THE UNITED STATES OF AMERICA, Respondant. } No. 205.

MANUEL HURTADO and JOSE ANTONIO GALLEGOS, Petitioners,
vs.
THE UNITED STATES OF AMERICA, Respondant. } No. 240.

The two above-entitled causes numbered respectively 205 and 240, having been duly consolidated and brought on for trial together upon the respective petitions therein filed in this court, and upon the answer of the defendant, The United States of America, the petitioners in cause number 205 being represented by their counsel, John H. Knaebel, Esq., and the petitioners in cause number 240 being represented by their counsel, N. B. Laughlin, Esq., and the United States of America being represented by Hon. Matt G. Reynolds, United States attorney, and the said causes having been submitted on said petitions and answers and the proofs and exhibits, both oral and documentary, and arguments of the respective counsel therein and the court being sufficiently advised in the premises, it is,

Therefore found, declared, adjudged, decreed and determined by the court:

First. That the petitioners above named have and hold such derivative interests in the claim mentioned in their petitions under Antonio Lucero, the original grantee of the grant known as the Cañada de Cochiti as entitle them, respectively, to prosecute their petitions in this court for the confirmation of the said grant.

Second. That on the 2nd day of August, in the year 1728, the King of Spain by Don Juan Domingo de Bustamente, his governor and captain general of the royal province of New Mexico, upon the petition of Antonio Lucero made to him a grant of a certain tract of land situate in said province, the same now lying and being in the county of Bernalillo in the Territory of New Mexico.

Third. That pursuant to the terms of said grant, the said Antonio Lucero received possession thereof holding and claiming the same under and by vertue of said grant and that he died seized and pos-

sessed of the same, and that it descended to his heirs-at-law
56 who with their assigns and legal representatives thenceforth continued under the same claim of title, the said possession and occupation up to and after the cession of New Mexico to the United States of America.

Fourth. The court therefore settles and determines that the said grant be and the same is hereby confirmed, and decrees the location boundaries and area of the same as follows, to wit: Said grant of land is bounded on the north by the old Pueblo of Cochiti, which is situate on the Mesa of Cochiti on the south side of the Cañada of Cochiti which point is about eight thousand one hundred and ninety feet in a northerly direction from the northwest corner of the lands of the Indians of the Pueblo of Cochiti as the same has been fixed and determined by the survey and patent of the same by the United States of America; on the east by the Rio del Norte (otherwise called the Rio Grande); on the south by the lands of the Cochiti Indians as the same has been fixed and located by the survey and patent thereof to the Indians of the Pueblo of Cochiti by and under the authority of the United States of America; and, on the west by the same old pueblo first above referred to as the northern boundary of the grant hereby confirmed,—which said grant of land contains an area — about five thousand acres of land.

Fifth. That the said private land claim is entitled to confirmation in the name of the original grantee Antonio Lucero for the use and benefit of all parties in interest claiming by, through or under him, under the same title.

Sixth. That said grant has not been heretofore confirmed in whole or in part by the Congress of the United States of America,
57 or otherwise lawfully decreed upon or adjudicated by any lawful authority of the United States of America.

Seventh. That the title and claim of the said grant of land within the boundaries herein set forth, founded on the said grant, is a good and valid claim to the said land under the treaty between the United States of America and the Republic of Mexico, known as the treaty of Guadalupe Hidalgo, and under the laws and ordinances of the governments of Spain and Mexico, and the title thereto is hereby established and confirmed to the said Antonio Lucero, the original grantee, and his heirs, assigns, and legal representatives, but the said confirmation shall only be deemed as a quitclaim or relinquishment on the part of the United States of its interest in the premises and shall not confer any right or title to any gold, silver, or quicksilver mines or minerals of the same, except so far as may be otherwise provided by law and also excepting from this confirmation any part of said lands that may have been sold or disposed of by the United States of America.

Eighth. And the petitioners, Joel Parker Whitney, and all others, having prayed for an appeal from the foregoing decree to the Supreme Court of the United States, it is ordered that the said appeal be and the same is hereby allowed.

Dated on this twenty-ninth day of September, A. D. 1894.

Q. When did it first come to your knowledge that this Sampson mine was included in this private land claim?

A. During the winter of 1893 or spring of 1894, possibly a little earlier than that. I remember having a conversation with
58 you in regard to it in which you thought that perhaps——

Objection.

What I was going to state—that is, what first lead me to inquire into the matter, the reason for that, but the first actual knowledge—that is, when I became convinced it was within the private land grant was in the winter and spring of 1893 and 1894.

Q. What action did you take upon learning that fact with reference to this claim?

A. What action?

Q. Yes, what did you do upon learning the fact that this mine was within this grant?

A. The first action we took was to employ an attorney to look after our interests in the matter.

Q. Do you know when either of these defendants, including Fagaly and Walker, went upon this ground?

By COUNSEL FOR DEFENDANTS: "Of your own knowledge" and objection because already gone over several times.

Objection overruled.

A. With reference to Mr. Pilkey, also, as one of the defendants, I believe?

Q. Yes, sir.

A. Well, he was as far as I know of my own personal knowledge always on the ground in possession.

Q. I should have added, under adverse claim of title to that of yourself, Johnson and Pilkey.

COUNSEL FOR DEFENDANTS: "Of your own knowledge?"

COUNSEL EXAMINING: "Or from statements made by any of them?"

A. Well, as a matter of fact I have had no conversations with any of those parties in reference to the claim—any of those defendants. My knowledge of what has been done there has
59 been learned through sources not directly from any of these defendants; I have not had any conversations with any of them with reference to that location since it was jumped.

Q. Well, then, the first that you knew of your own knowledge with reference to it was what you yourself learned upon your visit there you have testified to?

Objection as leading and sustained.

Q. When of your own knowledge did you first learn of the possession or claim on the part of these defendants or any of them including the defendants, Walker and Fagaly and Pilkey, as holding or claiming adversely to your title?

A. Well, the sources from which I obtained my knowledge——

COUNSEL FOR DEFENDANTS: If it is not your own knowledge I object to it.

A. Well,—I do not understand the question.

And the stenographer is instructed to, and does, read the last question.

A. The first absolute knowledge I had was on the filing of the location notice with the exception of my visit out there; I ain't positive now whether that was prior or not to my seeing the location notice, but whether the claim was recorded or not prior to my visit I do not know. I read the location notice on the claim when I was up there and found Mr. Lee Walker and this other party on the ground.

Q. About what date was that?

A. I think it was in February, 1894.

Q. Who did you find there at that time?

A. Now, that enables me,—I know now I saw the location notice on record prior to that date.

COUNSEL FOR PLAINTIFF: I will ask counsel for defendants
60 if they desire us to bring up the record from the recorder's office.

COUNSEL FOR DEFENDANTS: It is best to have the location notice in evidence.

Q. You had seen or had knowledge of the recording of the location notice prior to the visit that you made yourself to the mine?

A. Yes, sir.

Q. What did you see on the ground which is the Sampson?

A. I saw a stone cabin, some work done on the lead and those two parties there, Lee Walker and another man whom I do not recollect his name; they were not working there at the time; they were simply in possession.

Q. What were they doing and what claim, if any, did they set up?

A. The man who was in possession, that is the man who was on duty there as a guard, I met him on the trail going up and he said he was in charge of the Washington and had orders to allow nobody on the ground and (interrupted)——

Q. What else did you see there upon the ground; was there any notice posted?

A. Sir?

Q. Did you see any notice posted?

A. Yes, sir.

Counsel for plaintiff in this connection offers in evidence the record of the location notice of the Washington lead, Frank Fagaly and others, on page 576 of Book E of the records of mining claims of Bernalillo county, the same being an amended location notice, and same is introduced in evidence.

Amended location notice of the Washington lead introduced.

61 A. I do not think there was an original location notice ever recorded.

Said amended location notice was then read to the jury from the records. There was no available copy of the original notice to place in the hands of the stenographer as an exhibit and same will be copied hereafter from the records at the court-house and affixed as a part of this record as if inserted at this place when introduced in evidence.

(See part page 63 of this transcript.)

Q. Had you any conversation subsequent to seeing this location notice or the original one with any of the defendants with reference to appropriations, in which the interests were claimed in that ground described in the notice?

A. No, sir.

Q. When did you first know of any of the defendants going up to take possession of this ground?

(Objection.)

Except upon your visit—was that the first knowledge you had about it—that is, from any of them?

Objection overruled.

A. I had knowledge from one; I was perfectly friendly with all of the defendants, but never had any conversation with them about this matter with the exception of asking them in regard to visiting the district. Now, Mr. Fagaly——

Objection to what Mr. Fagaly may have said.

Q. Is Mr. Fagaly living or dead?

A. Dead, so I understand. I do not know that of my personal knowledge.

Q. Levy Walker, is he living or dead?

A. I believe he is dead.

Q. Do you know the dates of their respective deaths?

A. No, sir; I do not.

62 COUNSEL FOR PLAINTIFF: I will ask if counsel for defendants will admit the death of these parties?

COUNSEL FOR DEFENDANTS: Yes.

COUNSEL FOR DEFENDANTS: I do not know when they died; if we knew it we would admit it.

And upon further discussion among counsel it is admitted that Walker died August 19th, 1895, and that Fagaly died some 5 or six months prior to Walker's death.

On cross-examination he said:

Q. You had the first interview with Pilkey when with reference to the time that this contract and agreement *betwee naonyi hdmu goa mfwy gkqj m agreement* between you and him and Ben. Johnson was signed?

A. Do you mean when prior to that date?
Q. Yes, sir.
A. Possibly a couple of months.
Q. Where did you meet him?
A. Mr. Ben. Johnson brought him around to my office.
Q. Who was present besides you and Mr. Johnson?
A. I do not recollect that anybody else was.
Q. What did you talk to him about?
A. I talked to him about prospecting in the Cochiti mountains.
Q. How was your attention first directed to Cochiti Mountain prospecting—by whom?
A. By Mr. Ben. Johnson.
Q. He told you that Pilkey had been up there prospecting, didn't he?
A. No, sir, he didn't.

63 Q. Didn't you get some ore which Johnson said that Pilkey had brought down and have it assayed before you ever had any conversation with Pilkey on the subject?
A. Yes, sir.
Q. Let us look at that book you have there of account; turn to that account (the one previously set forth as "Cochiti Mining Company"). The first charge on that book is $2.00 for assaying ore which Johnson got from Pilkey and gave you before you ever talked with Pilkey?
A. What is that?
Q. That first charge is for assaying that ore about which you have just testified?
A. No, sir, it was not before I saw Mr. Pilkey.
Q. I notice that charge has no date to it; what should be the date?
A. I would not be positive to that for this reason, if you will allow me to explain; I sent the ore to Socorro to the smelter because Mr. Austin had been superintendent there and I was in the habit of sending occasionally ore there for assay and it cost us nothing there. After he had left the smelter I got this piece of ore and sent it there at the request of Mr. Johnson for assay, and the smelter made no returns on it for two or three weeks. I wrote them in regard to it and they replied stating that they were too busy to attend to anything in the way of assaying, except as to the work by the smelter and asked if they should turn it over to Mr. Anthony for assay who was the assayer in the town. I wrote back to them to do so; got the returns from Mr. Anthony and in the course of a month or so afterwards, after we had agreed on this contract, got a bill from him for the assay charges which were $2 00 and charged it up to the trio.

64 Q. The rock was sent down there to be assayed by you at the request of Johnson for the purpose of understanding yourselves about it before you made any agreement with Pilkey?
A. Yes, sir.
Q. How did you send that rock to Socorro?
A. I do not recollect now whether I sent it by mail or express.

Q. Did you write any letter about it?
A. I certainly must have notified the smelter what I wanted.
Q. Did you preserve any copy of that letter?
A. I presume I have, but I have not looked it up.
Q. I wish you would look it up, if you did.
A. I will do so; perhaps I may have it in one of those books that are here.
Q. I would like to have you look; the books are indexed are they not?
A. Yes, sir. (Witness looks.) I have found the letter, sir.
Q. Will you let me see it? (Counsel looks at same.) Having found that letter it shows you sent that ore to Socorro to be smelted on the 23rd day of March,—to be assayed, don't it, 1893?
A. Yes, sir.
Q. Now, are you positive you had ever talked with Pilkey prior to sending that ore down there?
A. I have no recollection of it; I do not think I ever met him prior to that.
Q. Now, how soon after that was it you met him and had a conversation with him at your office, Ben. Johnson being present?
A. Well, I should judge 3 or 4 weeks, possibly; it might not have been more than,—I think it was that long because I had no
65 definite,—no,—he may have visited the office to see about returns. I do not know as to that, but my recollection is it was 3 or 4 weeks.
Q. When did you get your returns from that assay?
A. I think it was about that length of time.
Q. Have you got your return there?
A. No, sir.
Q. Have you a bill of it?
A. Possibly I may have; I have not got it here, I do not think.
Q. Will you look and see?

Witness looks.

A. I do not find any bill of that kind here.
Q. Is that the assayer's certificate for that rock (handing witness certificate)?
A. I do not think it was; my recollection is that is another sample.
Q. Did you send more than one sample down there before you made your agreement with Pilkey?
A. My recollection is that Mr. Pilkey went to the mountains and got some more samples before we made that agreement.
Q. You are positive you had at least two interviews with Pilkey before the night of the 7th of May, 1893?
A. No, sir, I am not.
Q. Well, how many did you have?
A. I am positive I had one and possibly two, but I am not positive on that point; my distinct remembrance or recollection of Mr. Pilkey and our connection with him dates from the time we entered into the agreement; before that I took no particular notice of how

many times I saw him or what occurred, more than the recollection of him.

66 Q. But you had two samples of ore assayed before the 7th of May, 1893?

A. What is that?

Q. You had two samples of the ore assayed before the 7th of May, 1893?

A. I am not positive on that point. I know we had one sample assayed and I think two.

Q. Did you show Pilkey the assays?

A. I do not recollect whether I did or not.

Q. Don't you remember you told him it was low-grade ore but free milling?

A. No, sir, I would not tell him that because I would be an incompetent judge to tell what was free milling and what was not.

Q. The assayer might have reported to you?

A. No, sir, he would not.

Q. You understood that this ore came from some mines that Pilkey had already discovered?

A. No, sir.

Q. Didn't you understand that on the 7th of May, 1893?

A. No, sir, I did not.

Q. Didn't you testify this morning that part of the agreement executed under that date with reference to material and supplies that you furnished—$30 00 for sinking a shaft for 30 feet deep referred to one particular claim?

A. Yes, sir.

Q. Then you must have had one particular claim in view when you drafted that particular agreement?

A. No, sir.

Q. How long was it after that agreement was drafted before you heard of the Ellen L and the Mammoth?

A. In the latter part of May.

67 Q. And I suppose, then, the purpose of doing that work on a particular claim was to select some one claim on which to do it, and you hadn't made your selection at the time the agreement was drafted?

A. Yes, sir.

Q. Was it understood it was to be done on the lead where Pilkey had discovered this ore which you had had assayed?

A. As a matter of fact, from Pilkey's statement, the ore which we first had assayed was not discovered by Mr. Pilkey but was procured by him from a Mexican who said he got it in those mountains.

Q. Pilkey had been up there, hadn't he?

A. I do not think he had prior to that time; he may have been but he was not familiar with the country particularly.

Q. Didn't you state that he insisted that the ground was outside of the Cochiti grant?

A. That was afterwards when we made this agreement, and he might have made that assertion from hearsay, the same as I would

or anybody else. I do not suppose he knew positively either one way or the other.

Q. Then what was the purpose of putting a provision in this contract for the sinking of one shaft 30 feet deep when you didn't have any claim located?

A. Because after the first piece of ore that was brought, and prior to the time of that agreement, being drawn up, Mr. Pilkey had visited this section, for the first time, as I understood him, and stated that he had found a place and brought another sample of ore from that place which I think we assayed respectively, but I am not positive on that point, and stated that a shaft could be sunk there
68 very easily and readily; that is how we came to draw up the agreement.

Q. That was a particular place where you expected this shaft to be sunk?

A. No, sir, we knew nothing about the place ourselves, only by his representations?

Q. From his representations that was the place you fixed on?

A. Well, I ain't positive whether it was fixed on at that time or not; my recollection is that the particular place was fixed on after he went up.

Q. Was this place either the Mammoth, afterwards called the Mammoth, or the Ellen L?

A. It was a claim now known as the Mammoth?

Q. You say you made a pencil agreement the night before while you were talking in the office about it, while you and Johnson and Pilkey sat in your office the night before this agreement was signed—that you made a pencil agreement of some kind, didn't you?

A. My recollection is that I simply took down notes of what had been agreed on to form into a more lengthy and proper-worded agreement to be signed the next day.

Q. Do you know where those notes are?

A. No, sir, I do not.

Q. The next day, the next morning this agreement was signed?

A. My recollection is it was the next morning; that is my recollection.

Q. Was Pilkey, Ben. Johnson and W. C. Heacock all three present at the time the agreement was signed up?

A. Mr. Pilkey, Mr. Heacock and myself were present at
69 the time that Mr. Heacock signed; my recollection is that Mr. Johnson was not present at that time.

Q. Pilkey signed the agreement and went at once to the mountains, didn't he?

A. I do not know as to that.

Q. He left the office as soon as he signed it, didn't he?

A. I do not know as to that, whether he left immediately or an hour afterwards; he left some time after.

Q. Did you read the agreement to him?

A. I believe that I did.

Q. In the presence of Heacock?

A. No, I do not think Mr. Heacock was there but a few moments.

Q. Did Pilkey read it for himself?

A. I do not recollect as to that.

Q. Your impression is you read it to him?

A. My impression is this, that the agreement substantially as it is now was made out in pencil the evening before and read to Mr. Pilkey and Johnson and that agreement there is substantially and correctly a copy of that agreement entered into the night before which Mr. Pilkey there read or heard read, and my recollection is that he read that agreement the next morning, but I will not be positive on that point; if he didn't read it it was his own fault.

7.30 P. M.

Q. This agreement which you drew up does not provide for the payment of anything by you or Ben. Johnson except the articles and tools named in the agreement, and the sum of $30.00 for sinking a shaft 30 feet deep, and further provides that any money or
70 expense for provisions or other articles except as above enumerated should be deducted from the $30. What were you and Ben. Johnson to pay Pilkey for prospecting for you on this agreement?

A. Under the contract and understanding at the time this $30.00 referred to a specific amount of work to be performed on this claim to be selected and as that was aside from the ordinary prospecting work while he was employed in doing that any provisions consumed during the time of that work were to be deducted from the $30.00 but for ordinary prospecting work we were to furnish provisions and other necessary supplies, and, in fact, we never deducted anything from the $30.00 for provisions or supplies.

Q. This contract provides for the consideration—(reading)—"twenty-five pounds of giant powder, 100 feet of fuse, 1 box of caps, 1 hammer, — pounds of drill steel and one pick and when he shall have sunk or driven a shaft or tunnel four feet by six feet in a vein of mineral-bearing quartz to a depth of twenty feet from the lowest level of the surface at its mouth such vein and locality to be designated by you and Ben. Johnson he shall receive in addition to the sum of $30.00 less any moneys for provisions or other articles except as above enumerated."

A. I do not think that is the correct reading.

Q. Will you please look at that contract there (Exhibit 1) and see how it reads, the original copy?

A. There is just one item there; you stated "he shall receive in addition to the sum of $30.00," is the way you read it.

Q. I will take the original and read it (Exhibit 1). See if that is not in there.

A. If you will please point out.

Q. This word "addition" you say is not in there?

A. No, sir.

71 (Counsel for plaintiff underscores in pencil "in addition" in original copy of Exhibit 1.)

Q. "In?"

A. No, the way you read it, "he shall receive in addition 'to' the sum of $30.00," that is the way I understood you to read it.

Q. Leave out the word "to"—"in addition the sum of $30.00 less any moneys for provisions or other articles." That is in addition to those tools and supplies which you have mentioned above there?

A. Yes, sir.

Q. He shall receive the sum of $30.00 less the amount of any provisions furnished for sinking a shaft 20 feet deep, the work to begin in 20 days and to be completed to the satisfaction of yourself and Johnson, he to furnish—Pilkey to furnish you samples of all ores and minerals discovered and taken out of the workings—now I understand you to say that consideration applied to only one shaft he sunk alone—is that a fact or not?

A. The fact is that the $30.00 applied on that shaft, and that in fact the "grub," as we called it, furnished during the time he was doing that work, was to be deducted from the sum of $30.00, which as a matter of fact was not done.

Q. Now will you please take that contract (Exhibit 1) and point out any other consideration that is mentioned in it from beginning to end except that for the other benefits you and Johnson were to receive with reference to any other mine?

A. There is the consideration of a one-third interest which Mr. Pilkey was to have for one thing; the consideration of one dollar.

Q. Where is that one dollar consideration?

A. On the start in the agreement.

72 Q. Did you give him that one dollar at the time this contract was executed?

COUNSEL FOR PLAINTIFF: "I object; it is not to be contradicted."

COUNSEL FOR DEFENDANTS: "It is not under seal."

COUNSEL FOR PLAINTIFF: "I think it is" (and upon investigation it appears to be the word "seal" and the pen circle in ink enclosing it. Objection sustained.)

Q. That is the only consideration mentioned in the contract, is the sum of one dollar?

Counsel for plaintiff renews objection.

The COURT: "You are trying to get a contradiction from the witness of the terms of the contract?"

COUNSEL FOR DEFENDANTS: "I am not; I am trying to prove he never did proceed under the contract; that the only thing he did under the contract was to sink that 20-foot shaft."

COUNSEL FOR PLAINTIFF: "He is trying to contradict the terms of the contract."

COUNSEL FOR DEFENDANTS: "I propose to show they entirely abandoned this contract by the witness himself and that the terms of this contract was not complied with."

The COURT: "You have a right to show that."

COUNSEL FOR PLAINTIFF: "I have no objection to his trying to show abandonment of contract, or additional contract, but I am ob-

jecting to his endeavoring to contradict the terms of the contract itself and to show want of consideration; anything outside of that I have no objection."

The COURT: "What is your question?"

(Same read by stenographer.)

The COURT: "It is not competent cross-examination."

73 Q. The other consideration mentioned in the three paragraphs of the contract, as I have it, beginning, "The said second parties are to furnish the said first party at their expense," mentioning certain specific articles and the $30.00 in money, less the provisions, you say was the consideration for sinking the 20-foot shaft.

A. The tools, powder, etc., everything of that kind was furnished by us for all purposes; the specific article of the food consumed during the period of this work was to be deducted from the $30.00; everything else in a general way applied to his prospecting.

(Counsel for defendants, at this time saves his exception to the former question, or rather the adverse ruling upon the same by the court.)

Q. Go ahead—these specific articles, twenty-five pounds of giant powder, 100 feet of fuse, 1 box of caps, one hammer, blank pounds of drill steel and one pick, were articles to be used by him in sinking that shaft?

A. To the extent necessary.

Q. And it was supposed as far as the powder and fuse and caps were concerned they would be consumed in doing that, wasn't it?

A. No, sir; not necessarily.

Q. If any was left over was it to be his property?

A. No, sir; the property of the company.

Q. But that must have been talked of outside of the contract, as the contract does not say so, and that must have been talked over outside of the contract?

A. The whole thing was talked over and the contract and the portions of it on which there might be any grounds for dispute were embodied in this contract; as the contract states it was supposed to

74 run for one year, and the main part of it related to prospecting; this 20-foot shaft was simply a side issue.

COUNSEL FOR DEFENDANTS: "I submit again your honor, that the contract is not under seal and that I can go into the question of consideration; the scroll is nowhere recognized as a seal, and this contract is not under seal." Counsel then refers to legal decision in support of his contention, based upon the ground that the contract in question does not specify that it (the scroll) is a seal in the body of the instrument, and the court rules that is his understanding of the decision referred to. But at this stage of the controversy counsel for plaintiff announces that he withdraws his objection and the question is therefore allowed.

Q. Was that $1.00 paid to you at the time that contract was signed?

A. I do not recollect as to that.

Q. Don't you know positively as a matter of fact that is a mere form, matter of form, inserting that $1 00 in that consideration and that you did not give Pilkey one dollar?

A. I do not know anything of the kind; I do not have any recollection on the subject whether I gave him the one dollar or not; I may have given it to him and may not.

Q. And you don't remember whether you handed Pilkey the dollar on the morning of the seventh of May when Heacock was there and that contract was signed?

A. No, sir, I do not.

Q. But you do remember that the other matters of those articles and the $30.00 applied to the sinking of this shaft?

A. I believe that is specified in the contract.

75 Q. Yes, but I am talking about your testimony outside of the contract; didn't you so testify today?

A. I did not catch your question exactly.

Q. Didn't you testify today that the matter of the $30.00 and those specific articles related only to the sinking of the shaft 20 feet deep?

A. The matter of the $30.00 did; the specific articles, as the pick, the steel drill, the powder or anything of that kind were to be used to the extent necessary in sinking that shaft and for prospecting work, of course, in addition.

Q. The next clause in the contract is that "It shall be at the option of said second parties to continue working or abandon any claim located at any time they deem proper." That is to say, after Pilkey discovered a mine if you and Ben. Johnson saw fit to abandon it and not prosecute it any further you had the option of doing so?

A. Yes, sir.

Q. Did you talk that over before this contract was drawn?

A. We talked all matters contained in the contract over, that is either before or after it was taken down in the pencil copy which was afterwards reduced to that form (Exhibit 1).

Q. The first claim that Pilkey located after this contract was signed was the Mammoth, wasn't it?

A. I do not know.

Q. In the name of himself?

A. I do not know as to that; there was one or two other claims located I believe about the same time, whether they were prior to the Mammoth or afterwards I could not say.

Q. He located the Mammoth, Ellen L., Clear Creek and Columbus besides the Sampson, didn't he? Did he locate all those in the

76 name of himself, you and Ben. Johnson?

A. My recollection is that he did.

Q. Are the location notices for those claims recorded?

COUNSEL FOR PLAINTIFF: Object as irrelevant and immaterial and not proper cross-examination.

Sustained by the court because not proper cross-examination, without passing at this time upon objection on other grounds.

Q. How much work did Pilkey do on the Ellen L.?
A. I should judge about 12, possibly 15 feet.
Q. Did Pilkey do that work?
A. Well, I never saw him at work there.
Q. Was that claim located under this contract?
A. Yes, sir.
Q. Do you know whether the location notice was in yourself, Ben. Johnson and Pilkey?
A. It was in the name of Pilkey, Charles Johnson and Ellen L. Lockhart.

(Stenographer's notes show initials "E. L. L.," which may have been spoken by witness as "Ellen L. Lockhart," as he is in the habit of thus writing initials for the name in full when previously known to him in order to save time and more readily keep up with the speaker.)

Q. The first location notice that was put on that claim was Ellen L. Lockhart (or "E. L. L.")?
A. Yes, sir.
Q. You were a witness to the location notice; your name was signed to it?
A. I do not recollect as to that.
Q. It was located under this contract, however?
A. It was discovered under that contract and I believe that I put up the location notice myself; it was a portion of the claims
77 included in this contract and Mr. Pilkey is one of the parties named in the location notice.
Q. In whose name was the Mammoth located?
A. The same as the Ellen L.
Q. Who is Ellen L.?
A. My wife.
Q. Did you ever see the work done on the Ellen L.?
A. Yes, sir.
Q. Did you see it before the location notice was recorded?
A. I do not recollect as to that.
Q. Did you ever see the work that was done on the Mammoth?
A. Yes, sir.
Q. Did you see it before the location notice was recorded?
A. Yes, sir.
Q. You say that when you were there the latter part of August or the first of September the work had not been completed on the Mammoth?
A. No, sir; I did not say so.
Q. When was it completed on the Mammoth?
A. The work was completed on the Mammoth that is the location work.
Q. This 10 feet of work you are talking about?
A. Yes, sir; more than that amount of work done on the Ellen L. and the Mammoth both.

Q. I am talking about the work you said that Pilkey would have to hurry up and get through with so he could do the work on the Sampson before the 90 days expired?

A. That was an additional amount of work on the Ellen L., more than the law required for the location work. We had con-
78 cluded to go through the vein on that claim in order to tunnel it, if possible, and ascertain if there was pay ore there, consequently there was a good deal more work done on that claim than the law required, as well as on the Mammoth.

Q. Had you completed the work on the Ellen L. at that time?

A. At what time?

Q. When you were up there the latter part of August or the first part of September when you went and looked at the Sampson?

A. No, sir, he had not.

Q. The work was not completed on either the Mammoth or the Ellen L. at that time?

A. Yes, sir, the work was completed on the Mammoth at that time and long before.

Q. How much work was done on the Ellen L. at that time?

A. I do not recollect the amount of work that had been done.

Q. How many feet?

A. I do not know.

Q. 10 feet?

A. I do not think there had been.

Q. Were they working on the Ellen L.?

A. There had been some prospecting work done on it at different points on the lead.

Q. Was there a shaft 10 feet deep sunk on the Ellen L. or a tunnel 10 feet from the surface as described by you in your direct examination at that point?

A. I think not.

Q. Was he working on the Ellen L. at that time?

A. He commenced work on the Ellen L. the day I was there, that is this main tunnel on it he was to go through the lead.

79 Q. Did he stop work on the Mammoth when he commenced work on the Ellen L.?

A. Yes, sir.

Q. There was more than 10 feet of work done on the Mammoth at that time?

A. Yes, sir; there was more than 10 feet of work done on the Mammoth at that time.

Q. How much lacking of having 10 feet done on the Ellen L.?

A. He lacked a good deal.

Q. How much?

A. I do not know how much.

Q. 5 feet?

A. As I stated before there had been some prospecting done at different points on this Ellen L. lead; the depth of any one of them I do not know. Where we finally concluded to do the work would have required over five feet of additional work to finish it from the

fact that the ledge extended above the surface of the ground fully that distance.

Q. Didn't you testify on your direct examination this morning that the work had not been done on the Mammoth in order to comply with the requirements of the law and you were solicitous he could not complete it in time to do the work on the Sampson?

A. No, sir; not to my recollection.

Q. The work was already done on the Mammoth at that time, then?

A. Yes, sir; the Mammoth was the first claim worked.

Q. And the 10 feet of work necessary to comply with the law, as you understood it, had been completed at that time?

A. Long prior to that time.

80 Q. And it was the Ellen L. you testified the work had not been done on?

A. No; I do not recollect the exact language I used, but what I meant to say in regard to the Ellen L., that we concluded, and Mr. Pilkey was to do more than the regular location work required; he was to cut through the vein, which would require a much longer time than the ordinary location work, and that work had not been completed.

Q. Well, then, as I understood you, the ten feet of work necessary to comply with the law had been done on the Mammoth, but had not been done on the Ellen L.?

A. Yes, sir, that is right.

Q. And this was the latter part of August or the first of September?

A. That was when this contract to cut through the vein, the agreement or arrangement to cut through the vein was entered into.

Q. If you were so solicitous about time in which to do the work on the Sampson, why didn't you tell him to do ten feet of work on the Ellen L. and go over and do that work on the Sampson?

A. Because there was ample time; he had a month and a half in which to do it.

Q. Didn't you testify today that you expressed to him a great deal of solicitude about his being able to do the work in the time required by law, and he told you he had found a soft place in which to do the work?

A. Yes, sir.

Q. Did you go and look at that soft place?

A. No, sir, I did not.

81 Q. Now, I want to know, Mr. Lockhart, when—I have not got the record here—you can tell—where these claims the Clear Creek and the Columbus also located at that time, or located prior to that time?

A. The Clear Creek, if I recollect right, was the first claim that was located, I am not positive as to that, however; there was one claim located in Colla cañon on which he had done some work before I went up there the first time and as I saw no quartz on it, if I recollect right, I told him to do no more work on that until he had

looked over these other claims or found something better; I thought he would find something better.

Q. Well, it was located then, wasn't it?

A. Which?

Q. Prior to that time?

A. I am not positive as to the name, whether it was that name or some other; I do not recollect now.

Q. You remembered that name this morning, didn't you, and recalled it here yourself?

A. I recalled it as a list of the names, but those claims which were not worked or which were afterwards turned over to other parties as in the case of the Iron King, I paid no attention as to dates.

Q. Was that ever worked, the Clear Creek; was that ever worked?

A. I do not know.

Q. Was the Columbus ever worked?

A. The Columbus, if I recollect right, is the same claim as is now known under the name of the Iron King, if that is the one Mr. Dorsey & Eagle claimed to have located in 1890 or 1891, and after having done the assessment-work prior to the date at which we did it; two years prior to the date at which we did it.

Q. Don't you know that is not the Iron King?

82 A. I do not know anything of the kind; I said if it was the Iron King; I do not know it is not. One of the claims Mr. Pilkey located afterwards proved to be the Iron King; whether it was the Columbus or the Clear Creek I do not know.

Q. There was no more work done on it if it was the Iron King?

A. Yes, sir, there was.

Q. By Pilkey?

A. No, sir, not that I know of.

Q. Who did it?

A. Eagle and Dorsey.

Q. When?

A. They claimed the claim in 1891.

Q. Did you know anything of that except what they told you?

A. Well, I considered their statement sufficient.

Q. That is not in answer to my question.

A. What is your question?

Q. Do you know anything about their having done any work on it except what they told you? About any work having been done except what they stated to you themselves?

A. No, sir, I do not know of my personal knowledge.

Q. Don't you know that the Columbus claim is the claim located by James D. May under the name of the Black Gum afterwards?

A. No, sir.

Counsel for plaintiff objects on the ground that it is not proper cross-examination and not relevant.

(No ruling one way or the other and examination continues right on.)

Q. I am trying to get at the amount of work done up there——

83 COUNSEL FOR PLAINTIFF: Of course if it is desirous to go into a history of each of these claims—I supposed the claim in controversy was the Sampson mine and the examination-in-chief was directed to that and that only and upon this cross-examination if the door is opened to the history of each one of these locations made by Pilkey under this contract, of course up-redirect we will have to follow the gentleman with reference to them.

The COURT: As I recollect the testimony you did not ask about any work being done except the Sampson, but you did ask about these other locations. (Then follows further discussion between counsel as to whether witness was asked about work being done on other claims than the Sampson on direct examination. Objection is overruled at this point by the court and plaintiff excepts to said ruling.)

COUNSEL FOR PLAINTIFF: Of course it is open to re-examination and with that exception I have no objection to the testimony except the loss of time.

Q. Was the Iron King located in the summer, about June, by Eagle and his partner, however, or was Dorsey and Eagle before you were up there in the summer of 1893, were they in possession at that time?

A. I went up in the latter part of August, 1893, with Mr. Detrick; we missed the trail going up to Mr. Pilkey's place and went beyond it and we came to the location post with the name of Joseph Eagle and Dorsey upon it and the Iron King; the location was in pencil, of either 1890 or 1891, I would not be positive now, and about 12 feet of work done on it, the tunnel. I looked at it particularly from the fact that Mr. Pilkey had informed us there never had

84 been any work done up there.

Q. Why can't you answer my question without going into a whole chapter of history I did not ask you about. I asked you whether it was located prior to that time; if you know you can say so, and if you don't you can say so?

A. Whether I know it from my own personal knowledge or not cuts some figure and I want to explain how it came to my knowledge by reading the notice on this post. At that time I knew neither Mr. Eagle or Dorsey. I desire to answer your questions properly but want to be understood correctly in regard to them.

Q. Your answer is, that it was, isn't it?

A. Well, you asked me whether, you didn't ask me with reference to the time. My inference was that your question would imply it was located by Mr. Eagle and Dorsey, that year.

Q. No, I said prior to 1893 when you went there?

A. According to that notice I read it was located prior to 1893.

Q. Were they in possession when you went there?

A. I did not see them.

Q. Now, how many claims did Pilkey do the work on between the time, the 7th day of May, 1893, and the latter part of August or the first of September when you went over the Sampson as you call it?

A. As far as I know he only did the work on two claims; he did some work, possibly the location work, on one or two others.

Q. He did a good deal of prospecting work besides sinking these 10-foot holes and running these 10-foot tunnels, didn't he?

A. I do not think he did.

85 Q. How many months was he up there?

A. He was up there from somewheres about the middle of May, 1893, until the winter or spring.

Q. I mean prior to the first of September.

A. He was up there to my knowledge from the time he went up in May, about the middle of May, until the following winter, and I have seen him there frequently since then, but whether continuously there or not I do not know.

Q. Don't you know he left there on the 7th or 8th of May, immediately after signing this contract and staid there continuously, unless with the exception of a trip down here, up to the latter part of August or the first of September when you said you went there with Mr. Detrick?

A. I do not know of my personal knowledge when he went up there; my first letter I got from him was the 21st of May, I think. My supposition is—I presume, so far as I know, he was up there until some time in September continuously with the exception of sometimes he might have come to Albuquerque or been at Pino Blanco.

Q. And that was his sole business during that time, prospecting and locating these claims, as far as you know?

A. I know nothing to the contrary.

Q. Do you know when you took the location notices of the Mammoth and the Ellen L. to the recorder's office to have them recorded?

A. I do not recollect now very distinctly.

Q. You took them there?

A. I presume I did. I either took them or sent them.

Q. Look at this paper shown you (Exhibit 6). (Note: This
86 paper was marked Exhibit 6 at this time for identification or future reference only by me. A. B. Reading, stenographer), and say if that is your signature or not?

A. Yes, sir.

Q. You swore to that did you, that affidavit to it?

A. Yes, sir. (Same being amended bill, and affidavit attached thereto, in case number 4275, Henry Lockhart *vs.* J. Q. Wills *et al.*)

Q. Please state whether or not you did not swear to this bill, to this allegation in it: "Your orator further states, that thereafter the said named defendants (referring to James Q. Wills, Leeds, Johnson, Julia Johnson and Charles Pilkey and others) having so obtained possession of said property and premises, and believing the same to be situated upon the public domain and subject to entry under the mining laws of the United States and this Territory, in further pursuance of the said fraudulent confederation and conspiracy before mentioned, caused and procured the defendant- to stop development and work upon the said mineral vein or deposit

(meaning what you called the Sampson) under said agreement with your orator and said Johnson, and to fail and neglect to record the said location notice so by him posted thereon as aforesaid; " you can look at it?

A. I will take your word for it.

Q. You swore to that?

A. Yes, sir.

Q. If it was the understanding that you were to record the notices and you did record all the notices of mining claims which were located, under this agreement or contract, by Pilkey, it is not true that those defendants caused him to withhold said location notices from record, is it?

A. Yes, sir.

87 Q. How is it true if it was not his business to record them but your business?

A. It was not my business specially.

Q. Look at this location notice (Exhibit 4, already introduced in evidence) and state if you did not have that one recorded.

A. I would not state that I had it recorded personally; I either had it recorded personally or sent it for record and had it ordered returned to me from the fact that I kept all papers, bills, etc., connected with the enterprise.

Q. Pilkey didn't have it recorded, did he?

A. I think not.

Q. Did he have the location notice of the Ellen L recorded?

A. I do not know as to that.

Q. Did he have the location notice of the Mammoth recorded?

A. I think not.

Q. Did he have the location notice of the Columbus recorded?

A. I do not know as to that; I think not, however; I do not think he had any location notices recorded, that is any in which he was connected with us; and some one else had some location notices recorded while he was connected with us in some other parties' names.

Q. You don't know that that is true, do you?

A. Yes, sir.

Q. Whose name?

A. Mrs. De Mauro for one.

Q. How do you know that?

A. I know it because Mrs. Pilkey and Lee Dudley are witnesses to the record and it was located about the same time as our

88 claims were and before any other parties were up there from this section except Mr. Pilkey.

Q. You are not as particular about personal knowledge now as you were a while ago when I was questioning you about another matter?

A. I am always particular about personal knowledge.

Q. Was 10 feet of work done on that claim under the Sampson location when you recorded that notice?

A. I do not know, sir.

Q. Pilkey had not notified you it had been done when you had that recorded?

A. I would state that I believed there was 10 feet of location work done on it.

Q. I am not asking you what you believe; I ask you if Pilkey had notified you that 10 feet of work had been done when you had that location notice recorded?

A. No, sir.

Q. Take your book and state, this account book (ledger belonging to witness containing "Cochiti Mining Company" account previously referred to and copied into the record) how many supplies of goods or anything you sent there to Pilkey after September 1st, 1893. You have got them all on the book there, haven't you?

A. I think there is one bill not in the book, 25 pounds of bacon bought from —— ——; now, do I understand your question to be what was expended by us under this contract after the first day of September?

Q. My question is, How many goods, if any, did you send Pilkey, and how much money did you pay him—not what you paid

89 anybody else—after the first of September?

A. There was money expended, of course, on this contract, not paid directly to him.

Q. I am not asking you about this.

A. For instance, in the ore assays, when we had assays made.

Q. We will come to that; I will ask you about that.

COUNSEL FOR PLAINTIFF: He asked his question as to the amount of supplies or money paid to Pilkey.

A. In detail—I cannot give the exact amount on account of one bill for 25 pounds of bacon, I think was the amount.

Q. Which you haven't charged there?

A. Yes, sir, $21.85.

Q. How much?

A. $21.85; that does not include $30.00 paid by Mr. Ben. Johnson afterwards.

Q. What was that paid for?

A. That was paid for work.

Q. What work?

A. Work done up there.

Q. Done where up there?

A. For—I do not know as to that; Mr. Johnson told me he had paid him $30.00 on account of work he claimed to have done in that district; where it was or what claim it was, I do not know.

Q. When did Johnson tell you he paid him that $30.00?

A. I do not recollect the first time he told me; it is a long time ago.

Q. I asked you when Johnson told you he paid the money?

A. I think he told me in the spring of 1894.

90 Q. I am trying to find out from you when Johnson told you, at what date he paid the money?

A. That is what I have just answered.

Q. What date the money was paid by Johnson?

A. In the spring of 1894.

Q. It was not paid between the first day of September and the time these mines are said to have been "jumped," as you expressed it?

A. That was not the question you asked; you asked me what money had been paid to Pilkey after the first of September, or goods supplied?

Q. The question I asked you was to take this book and figure up from this book how much was paid after the first of September, and I understood you to say from the book it was $21 85?

A. That is correct, sir; I then specified in addition to that this other was paid.

Q. Which you don't know anything about except what Ben. Johnson told you?

A. I know this much, I had to stand half of it and I was satisfied with its accuracy; that is all I know about any of this business.

Q. Is that personal knowledge?

A. Well, I take it when I am in partnership with a party and bills and accounts are presented and I assume or pay a portion of them it becomes personal knowledge they have been paid.

Q. That consists of four items, this $21.85?

A. What did you say?

Q. This $21.85 consists of four items, does it?

A. I do not know.

Q. You can look at it and see?

A. "To wages of boy for Pilkey $8.00; to cash, Johnson to Pilkey, $5.00; cash, Johnson to Pilkey, $5.00 (this is not a repetition by mistake, but as appears on the ledger), and A. J. Maloy,
91 Johnson, $3.85;" and there is another item, Grunsfeld Bros., for bacon; it is not down there which I know was sent.

Q. Why didn't you put it down?

A. Well, I overlooked it simply. I ran across the bill is the reason I happened to discover it and also the shipping bill.

Q. Take that book and say how much of that $211.00 and some cents consists of assays and how much personal expenses in going up to the mine and back, and recording instruments. (Witness makes calculation from ledger as to which he has already been examined on direct examination and the account of which has already been embodied in the record.)

A. There is $211.11; on the book it is $213.11; I am satisfied the book is correct, if you think it is near enough (witness' addition getting $211.11 instead of book footing $213.11) without going over again. For groceries, not including this meat bill, $47.94; for hardware, which includes powder and supplies of that nature, $56 67; for sundries, which include freight, expressage and small details and things of that kind, $9.50; for assays, $40.50; expense to mine, $11.50.

Q. Is that all?

A. No, sir.

Q. Give us the second item, what was the second item, do you recollect?

A. $56.67; cash not including this $30.00 item, $45.00.

Q. Pilkey had a boy up there to help him didn't he, part of the time?

A. Not on our account.

92 Q. He didn't have anybody else to help him except the boy?

A. I do not know that he had anybody; he stated to me he got a boy to help him, but that was his individual business, not ours.

Q. That was to carry water to the mine, he had the boy for?

A. I do not know what his duties were.

Q. That $8.00 was to pay wages to the boy?

A. He told me he had hired the boy and wanted to get $8.00 to pay him and I sent him a check for $8.00; I do not know whether it was to pay the boy or what it was.

Q. That is the item you have got charged up there, wages for boy?

A. Wages for boy to Pilkey?

Q. Yes, sir.

A. Yes, sir; on Pilkey's account.

Q. That $11.00 was for your expenses up there, wasn't it?

A. Yes, sir.

Q. Is Dedrick's in there, too?

A. No, sir.

Q. Part of the time Pilkey took you over there, on one or two trips, on his own horses from Wallace, didn't he?

A. The first trip.

Q. Did you pay him anything for that?

A. No, sir; I didn't; the horse that was furnished me had no bridle and scarcely valuable enough to make a purchase of.

Q. The assays—did you show Pilkey all those assays?

A. No, sir.

Q. You and Pilkey had a difficulty along in September

93 because you didn't show him the assays, didn't you?

A. No, sir.

Q. No disagreement about that?

A. The difficulty didn't arise on that source, but he brought that in as additional pretext.

Q. Haven't you misrepresented the amount of assay which Harris made on ore taken out of this mine to Pilkey?

A. No, sir.

Q. Didn't he come to you and demand of you to give him an order on Harris to furnish him with the assay from his book?

A. No, sir.

Counsel for plaintiff objects as not cross-examination, but new matter, and objection sustained by the court.

Q. In this letter of August 12th (counsel refers to letter of August 11th, already introduced as Exhibit 3) "Your samples of rock re-

ceived. Have forwarded to Denver for assay;" what mine is that sample supposed to be out of?

A. Is that all the reference that is made in the letter to the samples?

Q. You can look at it.

A. I can tell better by the connection (and witness reads letter) this is from the Mammoth.

Q. Is there anything in that letter about ore taken from the Sampson?

A. No, sir—wait a moment; I haven't looked over it—that sample refers to the sample from the Mammoth, that is what Mr. Pilkey sent as purporting to come from the Mammoth.

Q. There is nothing in there with reference to any other ore except that; did you write another letter next day to Pilkey?

94 A. I presume I did; it is possible; I generally answered his letters frequently.

Q. Look over on the next page (of letter book) and see if you wrote one the next day, August 13th?

A. Yes, sir; this is not in evidence, however.

Q. I know it is not; I will put it in evidence.

Q. Did you receive any letter from him to which this is an answer?

A. I must have received one from him at some time to which this is an answer.

Q. Have you got it?

A. I do not know that I have; all the letters I have from Mr. Pilkey are on that table.

Q. Look at that (handing witness same) and say if it is in answer to any letter; it does not purport to be in answer to any letter, does it?

A. Do you desire me to explain what it purports to be?

Q. It does not say it is in answer to any letter.

A. I haven't read it through.

Q. Look at that letter (referring to another letter of August 12th, in letter book).

A. This is all right.

Q. That is the original of the copy you have in the book?

A. Yes, sir.

Q. I asked you if that was written in answer to any letter, or simply written on account of something that occurred to you after you had written the letter on the 11th?

A. No, sir; it was written after the receipt of the assay or the small piece of ore that he claimed came from the seam in the Mammoth. The piece of ore ran higher than anything we had received at that time. I enquired of Mr. Harris if it was a correct

95 assay. He said the sample was too small to predicate any result on. On that I sent Mr. Pilkey to have a large quantity sacked, I believe, from that seam sent down so I could get an accurate sample and find out if there was anything in it more than the small piece which he forwarded which was not more than one

inch or an inch and a half perhaps in length and not sufficient to get any proper assay from.

Q. That letter then refers to ore entirely from the Mammoth?

A. That particular portion of it does and that "sack send by express" refers to the Mammoth.

Q. Is there anything in there referring to any other mine?

A. No, sir; that all refers to ore from the Mammoth.

(NOTE BY STENOGRAPHER.—There was no other reference to the introduction of this letter of Aug. 12th just above referred to than the statement of counsel in reply to witness' remark that it was not in evidence, that he would put it in evidence; at least, at this time, and it is not clear to the stenographer whether it was intended to be introduced or should be considered as introduced in evidence, but to be on the safe side it is here copied in the record as follows: "Aug. 12. Chas. Pilkey, Esq., Pino Blanca, N. M. Dear Sir: How wide is that seam that you took the ore from wrapped in the red piece of paper and tied with a thread? Measure it exactly. How far from the top does it commence and does it continue down? How wide at the bottom? Send a sack of it down at once by express. Be sure and give full particulars regarding this streak of ore as I think it will run better than anything you have sent.
96 The rock you sent is not worth much; it is hard and close and not much mineral. Yours very truly. (Signed) Henry Lockhart.")

Q. In speaking about doing that work in the shaft, what was the value of the work to be done up there?

A. The kind of work done on that shaft was not worth anything, because as a piece of mining work it was worthless.

Q. It was in compliance with the law, though?

A. Yes, in compliance with the law; it was worth as location work; location work probably averages $20.00 to $30.00 according to the character of the rock. Location work is distinguished from assessment-work.

Q. When did you say you first went up there?

A. My recollection is some time in the early part of June.

Q. How long did you stay there?

A. The first time I went up it may have been the latter part of May; we got up there about 4 o'clock in the afternoon, I think, where we camped over night and left there about noon the next day.

Q. Then what did you do while you were up there that time?

A. We went over the lead on which the Mammoth and the Ellen L. were afterwards located—I believe the Mammoth at that time was located.

Q. You went over the ground, then, of those two mines?

A. We went over the ground. Whether—I ain't positive in regard to whether the Ellen L. was located at that trip or afterwards.

Q. Was the work done on the Mammoth then?

A. No, sir, I believe the location work was. As far as the
97 Mammoth was concerned it was an old location. Mr. Pilkey simply relocated the claim; it had been located prior to that and there was enough work done on it at the time for location, but it wasn't done by us or him.

Q. Was Pilkey's relocation notice posted at that time?

A. It was not a relocation notice. I say it was an old mine which he located; it was not a new discovery by him in the sense of finding a new property, and there had been some work done. How much Mr. Pilkey done to comply with the law I do not know at that time.

Q. Was his location notice under the name of the Mammoth signed in your name and Ben. Johnson's and his signed to it, posted at that time?

A. I am not positive whether it was posted at that time.

Q. Was the location notice of the Ellen L. posted at that time?

A. No, sir.

Q. You didn't post that until afterwards?

A. No, sir.

Q. Did you select a place for them to sink this 20-foot shaft at that time?

A. No, sir.

Q. Did you and he agree what you would do at that time about these two claims?

A. On which?

Q. On the Mammoth and Ellen L., what did you do about it?

A. We didn't agree on anything in regard to the Ellen L., that is in regard to where the work was to be done at that time; in fact, that was a matter that was left to Mr. Pilkey's judgment as to the location work, with the exception of this 20-foot shaft, and
98 that wasn't sunk where we desired it.

Q. Just simply went up there and staid from one day to another and looked over the ground where these two claims were and came back home?

A. No, not exactly; we put in the time as much as we could while I was there in examining the rock; we went over the lead, or at least the direction of the lead and examined the float on the line of the Mammoth and along what was afterwards located as the Ellen L.

Q. When was the next time you went up there?

A. About the first of July.

Q. What did you do then?

A. Well, about the same as before; we examined the work that had been done on the—at that time we had considerable work done on the Mammoth, and I—if I recollect right, that was when the Ellen L. was located; I am not positive.

Q. Who was present when it was located?

A. I believe—I do not believe there was anybody but Mr. Pilkey and myself.

Q. When was the Mammoth located?

A. The Mammoth was located prior to that; I believe some time

in May, or, possibly; my recollection is it was located in May, but it may have been later.

Q. Were you there when the Mammoth was located?

A. If it was located in May I was not.

Q. How long did you stay there on this second visit?

A. I think I staid—I do not recollect now whether I staid more than from one day to the next; that is, I got there, if I recollect right, somewheres about noon of one day and left the afternoon of the next, but may have staid there until the second day.

99 Q. Where did you stop?

A. I presume I stopped at Mr. Pilkey's cabin, that is the cabin on the Mammoth.

Q. He had built a cabin on the Mammoth since your first visit in the meantime?

A. No, sir.

Q. The cabin was there, wasn't it?

A. Yes, sir.

Q. Was it there before?

A. Yes, sir.

Q. An old cabin that somebody else had built?

A. Yes, sir.

Q. That was where he was living?

A. Yes, sir.

Q. On the Mammoth?

A. Yes, sir.

Q. Then you went up there the next time with Dedrick; what time was that?

A. That was about the last of August or the first of September.

Q. Were you ever there after that prior to the 23rd of October, 189–?

A. No, sir.

Q. On the third visit you made there Pilkey was living in this cabin on the Mammoth?

A. Yes, sir, he was living there during all the trips except the first one.

Q. His wife was living there with him?

A. Yes, sir.

Q. You and Dedrick stopped there with him?

A. I believe we did; I am not positive whether we stopped at the cabin or not; we had our blankets along, but I presume we did.

Q. That was about the only thing that belonged to the
100 mining camp that was there at the time, was Pilkey's camp, wasn't it?

A. What is that?

Q. Pilkey's cabin and himself and wife were the only things that pertained to the mining camp that was there, wasn't it?

A. There was supplies of tools.

Q. I mean there was no people there?

A. Yes, sir, there was an old prospector there from Cerrillos.

Q. What was his name?

A. I do not know his name; and there was more or less people who had sheep and cattle through there pasturing.

Q. They don't pertain to mining camps, do they?

A. You asked me in regard to people.

Q. Mining camps, I mean; people who staid at the mining camp I am talking about—this old prospector you found there and Pilkey and his wife were the only people looking for mines you found up there at this time?

A. They were all that I personally knew anything of; in fact, my information in regard to that came from Mr. Pilkey himself; if I recollect right there was two or three prospectors in there at that time.

Q. You and Dedrick slept in the Pilkey bed in the cabin while you were there?

A. No, sir, I told you I didn't recollect whether we slept in the cabin or outside; we always carried blankets along, and we may have slept in the cabin or slept outside.

Q. You went up there and Pilkey took you up and showed you the Sampson location?

A. Yes, sir.

101 Q. And the location notice was posted in a pile of rocks close to this tree?

A. My recollection is that the location notice was tacked up on the tree which had been blazed on the south side.

Q. Where was Pilkey when he gave you the copy of it you have produced here?

A. To the best of my recollection it was at the cabin.

Q. You knocked off a piece of the ore up there and looked at it?

A. I presume in the course of the trip we knocked off a great many pieces.

Q. I am talking about the Washington now or the Sampson as you call it?

A. I am referring to the Sampson also, in the course of our trip I suppose we knocked off two or three sacks of rock.

Q. What did you do with the two or three sacks you knocked off?

A. Left it on the ground as people do when they are prospecting.

Q. You brought some of it home, didn't you?

A. Yes, I believe I brought two pieces home.

Q. Two of those you had knocked off?

A. Yes, sir.

Q. Did you have them assayed?

A. I had one of them assayed.

Q. Have you got that assay?

A. No, sir.

Q. Where is it?

A. I do not know; nearly all or about all of the early assays we had when prospecting up there we took no particular account of; they were simply taken for the time being to give us an idea of what character *of* the rock was. They ran very similar.

102 Q. Where did you have it assayed?

A. If I recollect right Mr. Harris here in town assayed it.

Q. Did Pilkey give you any ore out of the Washington after you came back to the house that he said came from the Sampson, after you got back to the house?

A. No, sir, not that I know of, not that I recollect.

Q. Do you remember that you told him, after you returned to the house in the presence of his wife that you didn't think much of it?

Counsel for plaintiff objects if it is for the purpose of putting Pilkey on the stand to contradict witness, as he cannot be asked on cross-examination as to immaterial matters for the purpose of contradiction.

Counsel for defendants says he proposes to show that witness did not want the mine.

Counsel for plaintiff renews his objection that it is not proper cross-examination, which said objection is overruled by the court and counsel for plaintiff excepts to the ruling.

Q. Don't you remember when you went back to the house that you told Pilkey that you did not think much of that claim, that it was not worth anything?

A. No, sir, I never stated anything of the kind to Pilkey.

Q. You are positive about that, are you?

A. Yes, sir.

Q. You say you traced the ledge above the ground for one thousand feet through that claim?

A. No, sir, I did not.

Q. How much of the mineralized ledge did you see projecting above the ground?

A. I said that on the north side the ground was timbered
103 and covered mostly with soil; proceeding south there was more or less float, quite a considerable quantity of float, and there was either two or three quite large and well-defined croppings of quartz and porph-ry; then there was a space which was covered with alluvial or wash for quite a distance, and then there was a big porph-ry dike continuing on. We followed that dike until about opposite the cabin and then went down to the cabin, and the well-defined portion of the vein was pretty well towards the center of the claim.

Q. For what distance did you follow that dike, to a point opposite the cabin?

A. Oh, it must have been, I suppose, half a mile, perhaps not so far.

Q. It ran all across the mountain there that same dike?

A. There is a porph-ry dike indicating the mineral zone following north and south on the crest of the ridge.

Q. Do you know whether it was mineralized at that time or not?

A. I knew the vein in the vicinity where the croppings were, in the vicinity of the location notice, was mineralized; the porph-ry dike ran towards the south and had some quartz in it, but it was mostly covered with porph-ry; it was hard to determine the charac-

ter of that; the float was mineralized, that is what we went principally by.

Q. There is float all through that country, ain't there?

A. No, sir; there is very little float in that country.

Q. All over that mountain where this claim is located, is there?

104 A. No, sir; there are only two claims there that have much float on them.

Q. What are they?

A. The Ellen L. and Sampson.

Q. What direction is this claim, the Sampson from Colla cañon?

A. From Colla cañon—Colla cañon curves there, swerves around; in coming from Peralta cañon over across the country it would be north of Colla cañon.

Q. How far?

A. Oh, it would be perhaps one mile and a half, a mile possibly; I do not know the exact distance, more or less.

THURSDAY, 9.30 A. M., *February 13th*, 1896.

Q. You filed the location notice of the Sampson in the recorder's office on the 9th day of December, 1893?

A. Yes sir, I believe so.

Q. You had heard from other parties at that time that Walker, Fagaly, Leeds and Johnson had taken possession or attempted to locate this ground, hadn't you?

A. I had.

Q. You had heard also there had been a shipment of ore made by them and it was rumored it had run pretty high, hadn't you?

A. No sir, not that I recollect at that time; I may have so; as a matter of fact I didn't hear it ran pretty high but that it didn't pay expenses.

Q. But you heard they had shipped some ore from the mine?

A. I do not recollect whether it was prior or after that time.

Q. When did you hear about it, you also heard it was

105 within a few feet of the top of the ground where they got the ore?

A. No, sir, I didn't hear any special particulars in regard to whether they got it on top or where they got it, more than there had been a car of ore shipped from that property.

Q. I understood you to say last night that you never gave Pilkey an order on William Harris to furnish him a certificate or a copy of the assays he had made, which Pilkey had demanded and which he had not seen.

A. No, sir, you didn't hear me say any such thing.

Q. Didn't you say you didn't give him any order on Harris?

A. No, sir, I did not.

Q. What did you say?

A. You asked me the question whether Mr. Pilkey came to my office to compel me to give him an order on Harris and I said No, sir.

Q. He did come to your office and complain you had not furnished him the assays, but had kept them secret from him, didn't he?

A. He came to my office and made some complaint in regard to not having received the assay on one particular sample of ore, this sample I referred to last night, being a small piece not exceeding an inch in length—a piece which it was impossible to get anything like a fair or proper assay from. Mr. Harris got quite a heavy return on it; I asked him if it was a correct assay—(interrupted).

Q. Now you are going to tell a good many things I didn't ask you about.

A. I would like to explain so you will know exactly the circumstances surrounding it.

COUNSEL FOR PLAINTIFF: The witness has a right to explain.

106 THE COURT: That question can be answered yes or no.

COUNSEL FOR PLAINTIFF: Having answered the question he can give in explanation matter in connection with it.

THE COURT: I think if he answers he did or did not that is all that is required.

A. Yes, sir.

Q. He had not received this assay at that time—Pilkey had not received any copy of the assay at that time?

A. He had not; we never agreed to furnish him with copies of assays as far as that is concerned.

Q. You gave him that order on Harris at that time?

A. Yes, sir.

"EXHIBIT 7."

ALBUQUERQUE, N. M., *Oct.* 5, 1893.

Wm. Harris, city.

DEAR SIR: Please give Mr. Charles Pilkey duplicate copies of my assays made for me in your office.

(Signed) HENRY LOCKHART.

(The above was given to stenographer to identify, and which was marked for identification "Exhibit 7;" it was also marked Exhibit 17, and may have been introduced later when it was then so marked without the earlier exhibit mark being noticed.)

Q. Have you the original location notices of the Mammoth and Ellen L. in your possession, showing when they were filed for record in the recorder's office?

A. I do not believe I have them here. I have not the original location notice of the Ellen L.

107 Q. There was an amended location notice filed afterwards to these claims?

Q. Yes, sir.

Q. Both of them?

A. Yes, sir.

Q. I would like you to explain, if you have any data by which you can tell, when you filed the original location notices of those two claims?

A. The indorsement on the claims will show that, on the notices.

Q. That is the reason I am trying to get you to look at the notices and state that.

A. I haven't got them to look at them.

Q. What became of them after they were recorded?

A. The notice on the Mammoth is at my office.

Q. I would like to have you get them when you go over at noon and produce them and after looking at them state at what date you filed the location notice, both on the Mammoth and Ellen L., I refer to the original location notice and not the amended location notices.

A. I have the original location notice on the Mammoth, I am positive; on the Ellen L. I do not know where it is it may be possibly on file here in the clerk's office. I have tried to find it among my papers but it has been mislaid. I have the amended location notice on that but not the original.

Q. All I want you to do is to fix the time accurately, the time you filed the original location notices in the recorder's office, from any data you may have.

COUNSEL FOR PLAINTIFF: I submit that this is not the proper method of proving the filing of the location notices in the recorder's office, which is a matter of record, and is consuming the time
108 of the court uselessly, and object because it is not proper cross-examination.

Objection overruled and exception.

Q. I would like you to state how much Pilkey was to receive for work which he might do on the Ellen L., this work you have testified about.

Objection by counsel for plaintiff as not cross-examination and irrelevant. Overruled; exception.

A. There was nothing said about any compensation on the Ellen L.

Q. But it was fixed for the Mammoth in your written contract?

A. There was a special amount fixed for special work on the Mammoth in addition to location work which he was to do outside of that.

Q. You were doing 20 feet on the Ellen L., I understood you to say last night?

A. No, sir, you did not understand me to say anything of the kind.

Q. Yes, I did.

A. You are mistaken.

Q. You did not say that?

A. No, sir, I did not.

Q. You state you saw Walker up there on the Washington mine?

A. Yes, sir.

Q. Wasn't that in 1894 you saw him there?

A. Yes, sir.

Q. The mine was then in the hands of Receiver Bronson?

A. Yes, sir.

Q. What time in 1894?

A. Some time in February.

Q. Are you certain it was as early as February?

109 A. My recollection is it was. It may possibly have been—I was in camp February and returned; it may have been the latter part of February or in March; I am not positive as to the time. As soon as it became passable up there I was in the camp quite frequently.

Q. It was not very passable in February?

A. Sometimes just as passable as here in February.

Q. You say you met a man on the trail; is that before or after you saw Walker there?

A. The same day; the same time.

Q. Don't you remember that was a man by the name of Willis with Mr. Bronson out there in charge of the mine?

A. I do not recollect his name; he was in charge of the mine as I stated last night, under Mr. Bronson's orders, as I understood, the receiver.

Q. You hadn't been there from about the latter part of August or the first of September until this occasion?

A. No, sir, that was my first trip up that year.

Q. At that time, the latter part of August or the first of September, Pilkey was living in the cabin on the Mammoth?

A. Yes, sir.

Q. All the indications of possession of any kind you saw was this blaze on the tree and this location notice and a pile of stones close to it, on the Sampson?

A. All the evidences of possession on the Sampson was the location monument, the blaze on the tree and location work and evidences of prospecting on the lead.

Q. How much of a monument of stones was there that you refer to as location?

110 A. Such as miners ordinary build on the location.

Q. Just assume we don't know anything about it and never did see one; tell us about it?

A. I do not think I can assume that.

Q. Probably, because some of the jury never did?

A. Well, it would be probably—I should judge perhaps three feet; it is built up in the form of a round cone of loose stone ordinarily taken from the float on the ledge; generally about three feet high or thereabouts, more or less.

Q. This particular one I am asking you about?

A. I didn't measure it. I am giving my version about it—three feet, more or less, monuments consist generally.

Q. I am asking you about this particular one?

A. I said it was the same as miners generally put up.

Q. I am talking about this one?

A. I am talking about it also.

Q. How wide was it at the base, what was the size of the base on the ground?

A. Well, I didn't pay any special attention to it more than I saw it was an ordinary location monument, and the base in all prob-

ability, was perhaps three feet in diameter; might have been more or less. It might have been five for all I know. I know it was a good, fair-sized location monument.

Q. And it was three feet high?

A. I didn't say it was three feet high.

Q. How high was it?

A. I said three feet, more or less, about the ordinary size of some monuments.

Q. Sloping up, from the base up?

A. I said it was in the form of a cone.

111 Q. Now you say you saw development work done there; where did you see that?

A. No, sir, I did not.

Q. Prospecting work?

A. Yes, sir.

Q. How much prospecting work did you see and where was it?

A. I said it was on the ledge or lead.

Q. How much of work of that kind was done, please describe that.

A. Well, there was considerable of it where a man had gone along over the lead where float was and broken pieces of rock and picked around and exposed the character of the quartz.

Q. Broken off pieces of rock then?

A. Yes, sir, and removed from their original resting place.

Q. There was no holes of any kind sunk on the claim at that time?

A. No sir, not that I know of.

Q. That was the extent of the work you saw done?

Q. Yes, sir.

Q. That work, which you call prospecting work, and this monument and blaze on the tree and this location notice was all the evidence of possession you saw there?

A. Yes, sir, except Mr. Pilkey, he was an evidence of possession.

Q. Yes, but he went away when you went away; he went off the claim when you went away.

A. I undersand he is there still.

Q. I am not asking you about that; you know that is not in answer to my question. Was Mr. Pilkey on that claim residing or living there or simply went up there to show it to you and

112 then returned to his cabin when you went back?

A. Mr. Pilkey was not living on the claim, and after we had gone over the claim we returned to the cabin with Mr. Pilkey. When we left there we left Mr. Pilkey on the Ellen L. claim.

On redirect examination he said:

Q. This contract between yourself and Johnson and Pilkey—was there ever and change in that contract, agreement with reference to contract after one year between you three for the business of prospecting claims?

Objection by counsel for defendants, as the matter was gone into

fully on direct examination and there was no new matter brought out on cross. Objection overruled; exception; also objection by counsel for defendants upon the ground of leading and not proper redirect; overruled; exception.

A. There was no change whatever made in that contract from first to last as far as prospecting from the date of that contract for one year.

Q. The articles that are provided for in that contract, you have stated were partnership property, were they? (Objection, leading; sustained.) The provisions in that contract with reference to the payment of $30.00 for sinking a 20-foot shaft on the claim—you have stated I believe, that that provision related to a particular claim, did you not?

A. Yes, sir.

Objection but witness had already answered.

Q. What was the ordinary price at that time for doing location work in that district? (Objection; sustained.) What claims was location work done upon by Pilkey under this contract with yourself and Johnson?

113 A. As far as I know, prior to the location of the Sampson, he had done the location work on the Mammoth and the Ellen L.

Q. Any other claims?

A. Not that I know of, sir.

Q. You mentioned some other locations that had been made by him, the Clear Creek and the Columbus?

A. Yes, sir.

Q. What was done with reference to them?

A. There was some work done on the Clear Creek; I think it was the Clear Creek; I am not positive about that; it was a claim located in Colla cañon south of the Mammoth. I paid very little attention to it because there was no quartz of any kind, simply the porphyry dike. I believe Mr. Pilkey had done some work on that but how much I do not know, I did not examine.

Q. Well, what became of those claims?

A. One of them, the one in Colla cañon, was afterwards relocated by a doctor somebody, I forget his name now, and my impression is that Mr. Putney was associated in it with him or purchased an interest in it afterwards, something of that kind.

Q. And the other?

A. The other, if I recollect right, is the same claim as now known as the Iron King which we relinquished to Messrs. Eagle and Dorsey upon representations they had made a prior location and complied with the law in regard to doing the assessment-work, Congress having passed a law in regard to non-forfeiture of assessment-work for that year and they claimed they had done it for the prior year.

114 Q. Is that the claim to which you referred as having seen the location notice and evidences of work upon it?

A. Yes, sir.

Q. How far was this cabin upon the Mammoth upon which Pilkey lived from the Sampson mine?

A. It was in the vicinity of one thousand yards.

Q. And in whose name was the Mammoth located?

A. It was located in the name of Charles Pilkey, Charles Johnson and E. L. L.

Q. Who is Ellen L.?

A. My wife.

Q. Who is Charles Johnson?

A. Brother to Ben. Johnson.

Q. Under what agreement was that location made in the name of those three?

A. Under this contract with Mr. Pilkey.

Q. At whose suggestion or who made the location of the Mammoth?

A. Mr. Pilkey made the location of the Mammoth.

Q. At whose suggestion were the names of Ellen L., and Charles Johnson used?

A. At my suggestion.

Q. In whose name was the Ellen L. located?

A. The same as the Mammoth.

Q. And in the same manner?

A. Yes, sir.

Q. You spoke about a location of some claim made by Pilkey at that time, the name of which I did not catch, in other names than those under the agreement?

Objection, as it was a voluntary statement by the witness on cross-examination and not called out by any question. Objection sustained by the court.

115 COUNSEL FOR PLAINTIFF: "I would like to have the record show that the counsel for plaintiff asks the witness what the facts were in reference to a claim which upon his cross-examination he mentioned as having been located by Charles Pilkey during the existence of the partnership agreement between himself, Ben. Johnson and Pilkey in the vicinity of the claims in question, which is overruled by the court and counsel for plaintiff excepts, and concerning which he was not asked and did not testify upon his direct examination but solely upon his cross-examination"—which same appears from statement of counsel.

Q. There was shown to you an order which was not exhibited to the attorney upon the other side and which you identified as Exhibit 7; please look at it, and state who wrote it?

A. I wrote it.

Q. Who did you give it to?

A. To Mr. Pilkey.

Exhibit 7 introduced in evidence and read to jury.

(This has already been copied into the record on page 42.)

Q. What do you know with reference to Frank Fagaly having been up with Pilkey on this claim prior to October 5th, 1893?

Objection; sustained; exception by plaintiff.

Q. You say that Pilkey at this time complained to you about your not having giving him some assays?

A. Yes, sir.

Q. Had he prior to that time made any complaint?

A. No, sir.

116 Q. What rock was that referred to in this assay or this ore?

A. It was a small sample of rock from the Mammoth claim which he represented as coming from a soft seam; he sent down two or three small pieces wrapped in a red paper. I took one, the best, over to Mr. Harris and retained the other which I have with me now. The assay resulted very much higher than I anticipated. I went over to Mr. Harris' office and asked him if it was a correct assay; he said it was correct,——

Objection to what Harris said, and sustained.

Q. Where is Wm. Harris?

A. I do not know, sir.

Q. Is he in the country here?

A. No, sir. But of my own knowledge the sample was entirely inadequate to get a proper assay from. I stated the result to Mr. Johnson and asked him whether I should——

Objection.

Q. It was not in Pilkey's presence?

A. No, sir.

Q. Why hadn't you furnished to Pilkey the assay from that piece of rock?

A. Because I did not desire to raise any anticipations in his mind in regard to an extraordinary high return from the ore there, and I wrote him a letter,—I do not know—it has been introduced in evidence,—explaining——

Objection; sustained.

Q. Was there any other reason?

A. No, sir.

Q. At that time you had some open difficulty with Mr. Pilkey, didn't you, at the time of this order (Exhibit 7)?

A. On account of that order?

117 Q. At the time.

A. Yes, sir, there was a misunderstanding.

Q. Up to that time had you ever received any intimation of dissatisfaction on the part of Pilkey?

A. No, sir, none whatever.

Q. You had been corresponding, sending him goods,——

Objection, leading; sustained.

Q. Now just please state what occurred at that time, October 5th, 1893?

Objection, not proper redirect; overruled.

A. The difficulty referred to was on October 3rd and not October 5th.

Q. Just please state what occurred at that time?

A. He came to the office and stated he had completed the work and gone through the lead on the Ellen L. I asked him if he had brought in some of the rock or quartz upon the lead; he said he had brought in a sack of it. He went out and brought the sack to the office. I examined it and told him it was not vein matter, simply porphyry and country rock. He said he had gone through the vein and that was all he got out of it. I told him that I knew he was mistaken as the vein there was at least five feet wide or over of quartz and there was no quartz in this sack of samples he had brought. That led on from one word to another. Then he demanded $50.00. I told him that as I understood it there was no $50.00 due him; that we had never made any agreement to pay any cash consideration except the $30.00 for work done on the Mammoth extra as specified in the contract and that what money we had paid him in addition to the terms of the contract was simply because we appreciated he had a family and needed a little
118 extra money besides what we had agreed to furnish him to live; that if there was any additional money due him for work on the Ellen L., I would go up with him and examine the work he had done and if he had gone through the lead on the Ellen L., we would pay him whatever was right. I said, Mr. Pilkey we have stood by the terms of our agreement with you and expect you to stand by it with us. He replied to me; he said, "You can stick your agreement in your ass." I said, "I don't like that kind of language in this office and you had better get out." I met him on the sidewalk a short time afterwards and we had some further words in regard to the work on the Ellen L., and that was the last conversation I have ever had with Mr. Pilkey.

Q. What was the last communication oral or written you had from Pilkey before that time with reference to the Sampson?

A. I received a letter from Mr. Pilkey, dated September 8th, I believe, requesting——

Q. Have you got that letter?

A. Yes, sir.

Q. Will you please look it up?

A. Before going on I desire to state, as I understand it, it refers to our contract, that is—(interrupted).

Q. It will show for itself when you find it.

A. Here is the original and a typewritten copy.

Q. Whose writing is that in?

A. I believe it is Mrs. Pilkey's.

Q. How did you receive it?

A. By mail.

"EXHIBIT 8."

CANYON DEL COYE, *Sept.* 5, 1893.

Mr. Henry Lockhart.

119 DEAR SIR: Please send me one hundred pounds of flour one side of bacon ten pounds of lard & one dollar's worth of sugar and some more fuse 2 pounds of table salt and one pound of baking powder I can get this brought for the same as I can one coil of fuze brought up, I am getting along very well with the tunnel I am in about 15 feet and it is very hard rock. Please send as soon as possible and oblige

Yours respt.

(Signed) CHAS. PILKEY.

Which said Exhibit 8 was introduced in evidence and read to the jury.

Q. Do you know whether Pilkey had been here to Albuquerque after the writing of this letter dated September 8th, and October 3rd, the time at which this difficulty occurred?

A. Not of my own knowledge.

Q. At the time of your visit, the last of August, was it not, or the first of September?

A. Yes, sir; about that.

Q. 1893?

A. Yes, sir.

Q. What was the last thing said by Pilkey with reference to the work upon that Sampson mine?

Objection by counsel for plaintiff as not redirect. Overruled.

A. The last conversation, my recollection, respecting the Sampson was he would have the work completed within the time specified.

Q. What, if anything, did either you or Johnson ever say to him with reference to abandoning or ceasing work upon the Sampson?

Objection by counsel for plaintiff as not proper redirect, and that all of this testimony is over his objection as not being binding upon the other defendants in the case.

120 Objection sustained upon the ground that it has already been gone into.

Q. So far as the location notice upon the Washington you say you saw it upon the claim at the time you were there?

A. Yes, sir, I saw the amended location; I never have seen the original.

Q. You never have seen it?

A. No, sir, it is not on record.

On recross-examination he said:

Q. With reference to that claim you say was located in 1891, which you surrendered, did you look upon the record to see if the

declaration referring to the act of Congress dispensing with work in 1892 or 1893 was filed?

A. Yes, sir, I did.

Q. Was it filed?

A. No, sir, it was not.

Q. You say when you had that misunderstanding with Pilkey it was the 3rd of October, 1893?

A. Yes, sir.

Q. Didn't he tell you in that same conversation if you wanted your claims up there you could go up and take them?

A. No, sir.

Q. He never told you anything of that kind?

A. No, sir.

Q. Did you send the provisions he asked you to send him in this last letter you have identified here of September 8th?

A. Yes, sir.

Q. Did you send him those provisions?

A. Yes, sir, with the exception of 50 pounds of flour, except 100; everything else according to order:

121 Q. What direction is Coye cañon from the Sampson mine?

A. As I stated yesterday, Coye cañon curves, a portion of it is west and a portion south, that western and southern direction. What is called the north branch of Coye cañon is east of the Sampson and the main branch is west or in a westerly direction.

Counsel for plaintiff offers in evidence the original bill of complaint (marked Exhibit 9 at this time for identification) in the case of James Q. Wills *vs.* Frank Fagaly *et al.*, No. 3795 on the docket of the court, together with the answers of the respective defendants (hereafter offered and introduced as separate exhibits).

Counsel for defendants objects to the introduction of said bill upon the ground that it is not binding upon any other complainant except the complainant by whom the pleading was filed, as to whatever interest he may claim and no more.

The COURT: I do not suppose it was offered except for that purpose.

The court overruled objection and the same is introduced over the exception of counsel.

Same is read to the jury as follows:

"EXHIBIT 9."

Introduced and read in evidence.

TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

In the District Court of the Second Judicial District of the Territory of New Mexico, Sitting within and for the County of Bernalillo for the Trial of Causes Arising under the Laws of the Territory, at the March, A. D. 1894, Term Thereof.

To the Honorable Needham C. Collier, associate justice of the
122 supreme court of the Territory of New Mexico and judge of the second judicial district court thereof:

James Q. Wills, a resident of the county of Bernalillo and Territory of New Mexico, complains of Frank Fagaly, Lee Walker, H. C. Leeds, J. A. Johnson, Julia Johnson and Charles Pilkey, all residents of the county of Bernalillo and Territory aforesaid, and humbly complaining, respectfully represents unto your honor, that the said complainant did on, to wit: on or about the 20th day of October, A. D. 1893, enter into an agreement with the said defendants to prospect and locate mining claims in the northeast portion of the said county of Bernalillo, in the vicinity of the town called Cochiti, and in the Cochiti mining district, which said agreement was verbal, and was first made by the said complainant with the said defendant, H. C. Leeds, and by and through the said Leeds with the other defendants above mentioned, and subsequently said agreement was fully ratified and recognized by and between complainant and the other of said defendants themselves, which said agreement complainant alleges was verbal, and by the terms of which it was agreed and understood by and between the complainant and the said other defendants that he the said complainant should assist the said defendants by furnishing money, tools and provisions and assist in any other way in his power in prospecting and locating certain mines of gold, silver and other precious metals, the deposits of which said metals were supposed by the said complainant and the said defendants, from information which they had received, to be located in said section of said county of Bernalillo, as aforesaid, and in said mining district aforesaid, and in consideration of which said money, influence and assistance to be fur-
123 nished as aforesaid by said complainant, it was agreed and understood, that the complainant should have an interest in all claims located by said defendants in said district and section of said county.

Complainant further alleges that prior to the time of the making of said agreement between him and the said defendants, through the said defendant H. C. Leeds, and afterwards by himself, as aforesaid, it was agreed and understood by and between the said defendants that they, the said defendants, should prospect said section of country and locate mining claims therein, and if any valuable

deposits or indications of valuable deposits should be discovered, that the said defendants should be interested in said claims to the extent of one-fifth each respectively; that thereafter the said defendant Hub. C. Leeds, agreed with this complainant that in consideration of the money and assistance aforesaid, he would secure an interest in said locations for complainant, and complainant further alleges, that the said Hub. C. Leeds, for and on his behalf agreed with the said defendants, that of the one fifth interest in any claims located which should belong to him, the said defendant Leeds and his codefendants, Fagaly and Johnson, he the said complainant should have an undivided one-twentieth interest in said claims; that is to say, that out of the undivided one-fifth interest in said claim which under said original agreement should and would belong to the said three defendants, Leeds, Johnson and Fagaly, one-twentieth each should be set apart for the said complainant, making the interest of the said complainant and said three defendants in said claims so located each an undivided three-twentieths, and that the said defendants Pilkey and Walker should have
124 their original one-fifth interest each in said claims.

Complainant further charges and as hereinbefore alleged, that the said defendants entered into and made said agreement with said Leeds as aforesaid, and that thereafter the said defendants, each and all, agreed with the said complainant himself that he should have said interest as aforesaid; that is to say, that out of all claims so located in said district, the said complainant should have three-twentieths, the said Leeds three-twentieths and the said Fagaly three-twentieths and the said Johnson three-twentieths, and the said Walker and the said Pilkey each one fifth.

Complainant further alleges that in pursuance of said agreement, he furnished to the said defendant Fagaly in cash the sum of $140.00, and that he furnished and delivered to the said defendant Leeds, in cash the sum of $35.00, and furnished to the said defendants Fagaly and Walker and Pilkey tools and other supplies to the amount in full of $22.40, and complainant further alleges that the said defendants in pursuance of said agreement accepted said money and said tools and proceeded to locate certain mining claims in said county of Bernalillo, in the vicinity of said town of Cochiti, and in the said Cochiti mining district, to wit: the Washington lode, the original location notice for which said claim defendants give out and claim bore date the 23rd day of October, A. D. 1893, but complainant alleges, that in the month of December, A. D. 1893, *saalib aoin rdlu gkwyph of December* he procured his attorney to prepare new location notices in blank and furnish them to said defendant Fagaly, and which said location notice, the said Fagaly filled up and posted upon the said mines hereinafter described, and caused the same
125 to be recorded in the office of the probate court and *ex officio* recorder of the said county of Bernalillo. The first of which said location notices was posted upon the claim called the "Washington lode" and was filed for record in the said recorder's office on the 30th day of December, 1893. And complainant alleges that in and by the filing of said location notice upon said mine, and the

recording of the same in said recorder's office, the said defendants located under the mining laws of the United States, the said Washington lode, situated in the said county of Bernalillo, and in said Cochiti mining district, described as follows, to wit:

"Beginning at a post number 1, erected on said lode, lead and deposit, said post being the north end center monument of this claim and being the center of the north line of said claim, marked 'north end center post:' thence east three hundred feet to the northeast corner post number 2, marked 'northeast corner post;' thence south 1,500 feet to post number 3 southeast corner post, marked 'southeast corner post;' thence west 300 feet to post number 4 marked 'south end center post;' thence 300 feet to post number 5 marked 'southwest corner post;' thence north 1,500 feet to post number 6 marked 'northwest corner post;' thence east 300 feet to the place of beginning. All of said marks being in pencil. And the discovery shaft of said claim being located within the exterior lines thereof, and on the lode or lead hereby located, and upon which said discovery shaft is posted a copy of this notice of location, and the monument of stone around the north end center post is also posted a copy thereof and around all of said posts referred to are piles of stones,
said claim being about 2 miles north of Peralta mountain.
126 This claim is located in the said mining district about 15 feet
in a southeast direction from a big pine tree marked with a blaze."

And which said location notice was signed by the said defendants F. Fagaly, Lee Walker, H. C. Leeds and J. Johnson, and which is recorded in Book "E," page 576 of mining records in the office of the said probate clerk and *ex officio* recorder of the county of Bernalillo, a copy of which said location notice is filed herewith marked "Exhibit A" and made a part of this bill of complaint.

And complainant further alleges, that the said defendants further caused to be located another mining claim situated in said county of Bernalillo and Territory aforesaid, known as the "North Star lode," described as follows, to wit:

"Beginning at a post number 1 erected on said lode, lead and deposit, said post being the north end center monument of this claim, and being the center of the north line of said claim, and marked 'north end center post:' thence east 300 feet to the northeast corner post, number 2 marked 'northeast corner post;' thence south 1,500 feet to post number 3 southeast corner post, marked 'southeast corner post;' thence west 300 feet to post number 4 marked 'south end center post;' thence 300 feet to post number 5 marked 'southwest corner post;' thence north 1,500 feet to post number 6 marked 'northwest corner post;' thence 300 feet to the place of beginning. All of said marks being in pencil, and the discovery shaft of said claim being located within the exterior lines thereof, and on the lode or lead hereby located, and upon which said discovery shaft is posted
a copy of this notice of location, and in the monument of
127 stone around the north end center post is also posted a copy
thereof, and around all of said posts referred to are piles of stones. Said claim being about 2 miles north of Peralta mountain,

Cochiti mining district, Bernalillo county, New Mexico. This claim is located in the said mining district, about 20 feet in a north direction from a big pine tree marked with a blaze."

The amended location notice for which said mining claim is dated the 21st day of December, 1893, and is likewise recorded in Book E, page 578, and which was filed for record December 30th, 1893, and said defendants claim that the original location of said North Star lode was made on the 24th day of October, 1893. And which said location notice is signed by Frank Fagaly, J. A. Johnson, Lee Walker, and H. C. Leeds, a copy of which said amended location notice is filed herewith marked Exhibit B, made part of this bill.

Complainant further alleges that said defendants caused to be located another mining claim, known and called "The Sunny South," located in said mining district and in said county, described as follows, to wit:

"Beginning at a post number 1, erected on said lode, lead and deposit, said post being the north end center monument of this claim, and being the center of the north line of said claim, marked 'north end center post;' thence east 300 feet to the northeast corner post number 2 marked 'northeast corner post;' thence south 1,500 feet to post number 3 southeast corner post, marked 'southeast corner post;' thence west 300 feet to post number 4, marked 'south end center post;' thence 300 feet to post number 5, marked 'southwest corner post;' thence north 1,500 feet to post number 6, marked 'northwest corner post;' thence east 300 feet to the place of beginning. All of said marks being in pencil. And the discovery shaft of said claim being located within the exterior lines thereof, and on the lode or lead hereby located, and upon which said discovery shaft is posted a copy of this notice of location, and in the monument of stone around the north end center post is also posted a copy thereof, and around all of said posts referred to are piles of stones. Said claim being about 2 miles north of Peralta mountain, about 60 feet from the north end center where location-line paper is nailed to pine tree, about 60 feet south of north end center line. — direction from a big pine tree marked with a blaze."

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The original location of which, said defendants claim was made the 20th day of October, 1893, and the amended location notice for which was dated the 20th day of December, 1893, and filed for record in said recorder's office on the 30th day of December, 1893, and likewise recorded in said Book E on page 577, a copy of which is filed herewith marked Exhibit C and made a part of this bill; which said last-mentioned claim was located in the name of the said Frank Fagaly, J. A. Johnson, Lee Walker and H. C. Leeds. And for which said last two mentioned locations, the said defendant Fagaly likewise caused to be used the said notice of location which the said complainant had prepared by his attorney and which were given to said Fagaly by said complainant for that purpose.

Complainant further alleges that the said defendant Fagaly wrongfully and fraudulently failed to cause this complainant's

name to be signed to the said location notices, but signed or caused to be signed to the said location notices, the names of the
129 other defendants hereinbefore mentioned, as locators for said mining claims.

Complainant further alleges that the said defendant, Fagaly, now gives it out and pretends that this complainant was not to have any interest in any portion of said mining claim, so located, and refuses to recognize this complainant as having any interest therein, and refuses to convey any interest to said complainant, and refuses to account to said complainant for any of the money, tools and implements furnished by him as aforesaid under and in accordance with said agreement, made as aforesaid with said defendants.

Complainant further alleges, that the said defendant Frank Fagaly was the defendant who actually located said claims and signed the names of the locators to said notices, and complainant is informed and believes, that the said defendants Walker and Leeds afterwards procured the copies of the said notices above mentioned and caused them to be filed for record as aforesaid in said recorder's office.

Complainant further alleges that he is informed and charges the fact to be, that the said defendant Fagaly has caused other claims to be located in said district, and in the vicinity of the said claims hereinbefore described, at least three in number, and that said Fagaly admits that he has so caused at least three claims in number to be located, but complainant is informed and believes, that he caused to be located several other claims in addition to those hereinbefore described, and the three so admitted, but complainant is informed and believes, that he refuses to show the location notices for the same to complainant or his codefendants, and that he
130 has failed and refuses to cause said location notices to be recorded in the recorder's office, as required by the laws of the United States and of the Territory of New Mexico; all of which said claims so located are subject to the agreement hereinbefore set up and alleged, and which said agreement was fully recognized and assented to by the said defendant Fagaly.

Complainant further alleges that the said defendant Fagaly has admitted the making and locating of at least three other claims in addition to those described, in writing, which said writing, was executed by the said defendants Fagaly, Leeds and Johnson, and by its terms recognize and declare that the said defendant Walker was entitled to two-fifths interest in said claims, which said declaration in writing was filed and recorded in the said recorder's office, and recorded in Book F, page 302, of mining records, a copy of which complainant filed herewith and makes the same a part of this bill, marked Exhibit D.

Complainant further alleges, that the said defendants Fagaly and Walker, conspiring to defraud this complainant out of the interests agreed to be given him as aforesaid, in locations made in said district, in pursuance of said agreement, have caused to be located another mining claim called "The Golden Era," situated in said county and in said district, which is fully set up and described in the loca-

tion notice for the same, and which location notice is recorded in the said recorder's office in Book F, page 10, and which said claim is described as follows:

"Beginning at a monument of stones (monument number 1) erected on said lode, lead and deposit; said monument number 1 being the north end monument of this claim, and being the center of the north end line of said claim; thence east 300 feet to a
131 monument of stones (number 2); thence south 1,500 feet to a monument of stones (number 3); thence west 300 feet to a monument of stones (number 4); said monument number 4 being the south end monument and home for the purpose of procuring tools and sending west 300 feet to a monument of stones (number 5); thence north 1,500 feet to a monument of stones (number 6); thence east 300 feet to the place of beginning.

And for further description lies on the south side of the Peno canyon, runs north and south lies 2 miles north of Peralta mountains, running 1,300 feet south from location post and 200 feet north from location post."

A copy of which said location notice, the said complainant files herewith and makes a part of this bill, marked Exhibit E. Which said location notice is signed by the said defendant Walker alone.

Complainant further charges the fact to be, that the said Fagaly, in the presence of said Walker, and that said Walker assenting thereto, agreed with this complainant, when they were present upon the ground, to locate said last-mentioned claim in pursuance of the terms of said agreement between this complainant and the said defendants as aforesaid, nevertheless, after expressly agreeing to locate this particular ground as aforesaid and after said complainant left the said locality and returned to his the center of the south end line of this claim; thence to said defendants, yet the said defendants Fagaly and Walker disregarding their said agreement, and in fraud of the rights of this complainant, located said last-mentioned claim in the name of the said Walker alone and deny that the said complainant has any interest therein, and refuse to recognize
132 him and the other defendants Johnson and Leeds as having any interest in said last-mentioned claim.

Complainant is informed and believes that the said defendant Walker recognizes the said defendant Fagaly as having an interest in said last-mentioned claim, and that the same was so located in the name of said Walker by combination and agreement between the said Fagaly and Walker to defraud as aforesaid this complainant and their other codefendants.

Complainant further alleges, that he is informed and believes that the said defendant Walker gives out and claims that the said defendant Pilkey is interested in his two-fifths of said claims located as aforesaid, and the other claims hereinbefore referred to, the exact extent and the amount of the interest or portion of the said Pilkey, and the amount claimed by the said last-mentioned defendant being unknown to complainant.

Complainant further alleges, that he is informed that the said defendants Leeds and Johnson recognize the interests of this com-

plainant in and to said mining claims and are ready and willing to carry out their agreement with this complainant.

Complainant further alleges, that he is informed and believes that the said defendant Frank Fagaly gives it out that he has caused the "North Star" and the "Sunny South" mining claims above described to be relocated in the names of other persons for the purpose of defrauding this complainant, and his codefendants Leeds and J. A. Johnson and Julia Johnson out of their interests in said claim.

And complainant further alleges that the said defendants Walker, Pilkey and Fagaly are now causing one or more of the claims located, under the terms of said agreement, and in which
133 under the terms of said agreement complainant is entitled to have an interest, to be worked, and are extracting and removing valuable ores of gold and silver therefrom. Complainant alleges that some of said claims contain gold and silver ores of great value, and complainant further charges the fact to be that the said defendants Fagaly, Walker and Pilkey are men of no means or property whatsoever, and that a judgment when obtained against them would be utterly worthless.

Complainant further alleges, that he is informed and believes that said location notices were signed or intended to be signed J. Johnson, which said signature was signed or intended to mean the defendant Julia Johnson, the wife of the defendant J. A. Johnson, and that any interests in said claims so located or to be located, standing in the name of "J. Johnson" or "J. A. Johnson" belongs to or are intended to belong to the said defendant Julia Johnson.

(As far as read to jury although all of bill introduced.)

Complainant further alleges, that all the actings and doings of the said defendants Fagaly, Walker and Pilkey are in fraud of the rights of this complainant, and for the purpose of defrauding complainant out of his interest in said claims, and complainant well hoped that no disputes would have arisen touching the said location of said mining claims, and the recognition of his interest and the carrying out of said agreement with him but that the defendants would have complied with the reasonable requests of complainant as in conscience and equity they ought to have done, but so it is, may it please your honor that the said defendants Fagaly, Lee *and*
134 Walker and Charles Pilkey, combining and confederating together, and with divers persons at present unknown to your orator, whose names when discovered by your orator he prays leave to insert in this bill and with apt words to charge them as party defendants hereto, and contriving how to wrong and injure your orator in the premises, and absolutely refuse to comply with said agreement, all which actings and doings of the defendants are contrary to equity and good conscience, and tend to the manifest wrong and injury and oppression of your orator in the premises.

In consideration whereof, and inasmuch as your orator is entirely remediless in the premises, according to the strict rules of the common law, and can only have relief in a court of equity where matters of this nature are properly cognizable and relieveble, and

To the end therefore, that the said defendants, Frank Fagaly, H. C. Leeds, Lee Walker, Charles Pilkey, J. A. Johnson and Julia Johnson, and the confederates when discovered, may be required to full, true and direct and perfect answer make to all and singular the matters hereinbefore stated and charged, but not under oath, the answers under oath being hereby expressly waived, and that the said defendants may be decreed to specifically carry out and execute the agreement hereinbefore set up and made with complainant and that they may be decreed to hold the title in and to said mining claims hereinbefore described, and all other mining claims located since the making of said agreement, and up to the date of the filing of this bill in said northeastern portion of the county of Bernalillo, in and near the town of Cochiti, and in said district known as the Cochiti mining district, in trust for the benefit of this com-
135 plainant, to the extent of his interest in said claims, under the terms of said agreement, and that the extent of his interest may be fully ascertained, and that the defendants Frank Fagaly, Lee Walker and Charles Pilkey may be required to record the location notice of any claims located since the making of said agreement, and up to the time of the filing of this bill, in said mining district, in the proper recorder's office, and that the said defendants, Frank Fagaly, Lee Walker and Charles Pilkey may be enjoined and restrained by the order of this honorable court from working, taking out, removing, or extracting ore from any of said mining claims and from transferring any mining claims located in said mining district and not recorded or from encumbering the same in any manner, and from causing the same to be recorded in the name of any other person or persons, and from doing any other acts to defraud this complainant out of his interest in said claims, until the location of the same can be ascertained, and the same caused to be recorded and that the said defendants may be decreed to convey the interests in said claim to this complainant, as he may be entitled to have, and receive, and that said complainant may have such other and further relief in the premises as the nature of his case shall require and to your honor shall seem meet.

May it please your honor to grant unto your orator the writ of subpœna in chancery, directed to the said defendants, Frank Fagaly, Lee Walker, Charles Pilkey, H. C. Leeds, J. A. Johnson and Julia Johnson, and the rest of the confederates, when discovered, thereby commanding them and every one of them to be and appear before this honorable court, then and there to answer any, all and
136 singular the premises, and to perform and abide such order and decree therein as to your honor shall seem meet.

May it please your honor to grant unto your orator a temporary writ of injunction to be directed to the said defendants, Frank Fagaly, Lee Walker and Charles Pilkey, restraining them and each of them, their agents and attorneys, servants and employés and confederates, from in any manner working, taking out and removing ore and extracting the same from any of said mining claims, and transferring any mining claims located in said mining district, and from transferring any mining claims, the loca-

tion notices of which are not recorded, and from encumbering the same in any manner, and from causing the same to be relocated or recorded in the name of any other person or persons, and from doing any other acts to defraud this complainant out of his interest in said mining claims, and thus your petitioner will ever pray.

(Signed) JAMES Q. WILLS.

W. B. CHILDERS,
Solicitor for Complainant.

TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

James Q. Wills, of lawful age, being duly sworn, upon oath deposes and says:

That he is the complainant in the foregoing bill of complaint, and has heard the same read and knows the contents thereof, and that the same are true, except as to those matters therein stated to be upon information and belief, and those matters he believes to be true.

[NOTARY SEAL.] (Signed) JAMES Q. WILLS.

137 Subscribed and sworn to before me this 3rd day of February, A. D. 1894.

(Signed) E. L. MEDLER,
Notary Public.

(Endorsed:) Filed in my office this 5th day of Feb., 1894. (Signed) O. N. Marron, clerk.

Counsel for plaintiff offers in evidence answer of defendant Lee Walker in case No. 3795, James Q. Wills *vs.* Frank Fagaly *et al.* (marked Exhibit 10 for identification at this time). The whole is offered in evidence but only that portion is hereafter read to the jury as will be shown by brackets in pencil mark when same is introduced.

Counsel for defendants objects, and makes the same objection to this answer that he made to Exhibit 9, viz: that it is not binding upon anybody except the defendant Lee Walker or those who may be claiming under him since the filing of said bill, and further objects unless the balance of the answers are put in evidence to show Pilkey did not enter an appearance and appearance was entered by W. & F.

(The stenographer's notes show these initials, which he supposes he wrote at the time for Warren & Fergusson.)

Which objection is overruled by the court.

Counsel for plaintiff stating "Pilkey did file an answer and it is in here and sworn to."

Said above answer is then introduced in evidence as Exhibit 10, that portion read to jury enclosed in pencil bracket and is as follows:

Same is admitted over the exception of counsel for defendants.

"EXHIBIT 10."

Introduced in evidence and a portion read.

138 *Separate Answer of Lee Walker, One of the Defendants.*

In the District Court, Second Judicial District, Territory of New Mexico, Sitting in and for the County of Bernalillo.

J. Q. WILLS, Plaintiff,
vs.
FRANK FAGALY ET AL. } No. 3795.

The separate answer of Lee Walker, one of the defendants, to the amended bill of complaint of J. Q. Wills, complainant.

To the Honorable Needham C. Coolier, associate justice of the supreme court of the Territory of New Mexico and judge of the second judicial district thereof:

This defendant, now and at all times hereafter, saving and reservi g unto himself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties and other imperfections in the said bill contained, for answer thereunto, or to so much and such parts thereof as this defendant is advised it is or are material or necessary for him to make answer unto, answering, says:

He denies that on or about the 20th day of October, A. D. 1893, he entered into an agreement with complainant to prospect and locate mining claims in the northeast portion of the county of Bernalillo, in the vicinity of the town called Cochiti in the Cochiti mining district.

He denies that he made a verbal agreement, or any other agreement with complainant through H. C. Leeds, or any other person, which said agreement was fully ratified and recognized be-
139 tween said defendant and complainant, and which said agreement was in terms and according to an understanding by and between the complainant and this defendant, that the said complainant should assist this defendant in furnishing money, tools or provisions, and assist in any way in his power in procuring and locating certain mines of gold, silver or other precious metals.

He denies that it was agreed and understood between complainant and this defendant that complainant should have an interest in all the claims located by or through him the said defendant in said district and section of said county above mentioned.

He denies that at any time before the filing of the bill of complainant or at any time afterwards that the said complainant made an agreement or had any understanding between himself and this defendant that they should prospect said section of the country and locate mining claims thereon, and if any valuable deposits or indications of valuable deposits should be discovered that he the said complainant should in any way secure an interest in said locations.

This defendant denies that he had any agreement with said Wills either by himself or through any other person as to any interest that said complainant might have in any location that might be made by this defendant or any other person connected with him.

And this defendant further answering says, it may be true for anything this defendant knows to the contrary that said Wills did have an agreement with said Leeds and Johnson to share in their said interest in said locations, but this defendant is an utter stranger to all and every such matters, and can form no belief concerning the same.

140 Defendant denies that it was understood and agreed that complainant should have any part or portion of this defendant in claims located in said district and in section of the said county above mentioned.

This defendant further answering denies that he made any agreement with Leeds or Wills either together or singly that the said Wills should have any interest as aforesaid.

Defendant further answering says, that he has never heard or been informed, save by complainant's said bill whether he the said J. Q. Wills furnished to defendant Fagaly in cash the sum of $140.00 or that he J. Q. Wills delivered to the said Leeds in cash the sum of $35.00, and this defendant is an utter stranger to all and every such matters and cannot form any belief concerning the same.

Defendant further answering says, he denies that the said complainant furnished tools to him, or other supplies to the amount of $21.40, or any other amount to the defendant.

(Beginning of pencil bracket:)

(And the defendant further denies that according to any agreement with the said Wills or with any other person he accepted said money and said tools to proceed to locate certain mining claims in the said county of Bernalillo in the vicinity of said town of Cochiti mining district, to wit: the "Washington lode."

Said defendant admits and avers the same to be true that he did on the 23rd day of October, A. D. 1893, file a location notice upon certain claims known as the "Washington lode."

He admits that said location notice was filed with the recorder of said county.

He admits that said location is the same as described in complainant's bill.

141 He admits that said location notice was signed by Frank Fagaly, L. Lee Walker, H. C. Leeds and J. A. Johnson.)

(End of pencil bracket.)

This defendant further answering, says, it may be true for anything this defendant knows to the contrary, that he the said complainant did in the month of December procure his attorney to prepare new location notices in blank and furnish same to said defendant Fagaly which said location notices the said defendant Fagaly filled up and posted upon said mines described in said complainant's bill and that he the said Fagaly caused the same to be recorded in the office of the probate clerk and *ex officio* recorder of the said county of Bernalillo, but this defendant is an utter stranger

to all and every such matters and can form no belief concerning the same.

This defendant admits that the location notices above referred to as giving the date of location of the 23rd day of October, A. D. 1893, *was* filed in the office of the recorder of said county of Bernalillo on the 30th day of December, A. D. 1893.

Defendant admits that he with other persons caused to be located a certain mining claim situated in the county of Bernalillo and Territory of New Mexico known as the "North Star" lode which same is as described in bill of said complainant.

This defendant further answering says that it may be true for anything that this defendant knows to the contrary, that defendants Leeds, Fagaly and Johnson agreed with said complainant that of the one-fifth interest in any claim located which should belong to them he complainant should have an undivided one-twentieth in-

142 terest in said claim, that is to say, that out of the undivided one-fifth interest in said claims should or would belong to said three defendants Leeds, Johnson and Fagaly one-twentieth of which should be set apart for said complainant making the interest of said complainant and said three defendants in said claims so located each an undivided three-twentieths, but this defendant is an utter stranger to all and every such matters and can form no belief concerning the same.

(Beginning of pencil bracket:)

(Defendant admits that defendant Pilkey and this defendant should each have an one-fifth interest of said claims.)

(End of pencil bracket.)

Defendant denies that upon the 16th day of December, A. D. 1893, he filled up and caused to be posted upon the mines aforesaid, or any other mining claims *and* notices of location or that he caused the same to be recorded in the office of the probate clerk and *ex officio* recorder of the county of Bernalillo.

And this defendant further answering says, he denies that a location notice had not been posted upon said lode or mining claim known as the "Washington lode" prior to the preparation of such blank notices of location, and he avers to the best of his knowledge and belief that there was posted a location notice upon said lode and said mining claim on the 23rd day of October, A. D. 1893, and that the said claim was then and there located upon the ground, and he further avers and states it to be true that he the said defendant as a party thereto entered into the possession of the same on the date aforesaid, to wit the 23rd day of October, A. D. 1893.

Defendant denies that the first location made upon the

143 claim called the "Washington lode" was made on the 16th day of December, A. D. 1893.

And defendant further avers and states it to be true that the "North Star lode" as above stated was originally located on the 26th day of October, A. D. 1893.

And defendant further states that within his knowledge the said mine known as the "North Star" was located prior to the 21st day of December, A. D. 1893.

Defendant further answering denies that the location notice marked "Exhibit B" in complainant's bill purporting that the said location had been made on the 21st day of December, A. D. 1893, and that the same had been filed on the 30th day of December, 1893, is a copy of the true first location notice of said mine made according to law.

Defendant admits that said location notice of the "North Star" mine is signed by Frank Fagaly, J. A. Johnson, Lee Walker and H. C. Leeds.

Defendant admits that he with others including said complainant located another mining claim known and called the "Sunny South," which was located in the mining district and county above mentioned.

Defendant admits that the description of said "Sunny South" mining claim as stated in said complainant's bill is correct, so far as the marks and boundaries of the same is concerned.

Defendant avers and states it to be true that the said mining claim known as the "Sunny South," to the best of his knowledge and belief was located on the 28th day of October, 1893.

Defendant denies that any location of said mine had ever been made until the 20th day of December, 1893.

144 Defendant denies that complainant's copy of a pretended location marked "Exhibit C" in complainant's bill is a true copy of the original location made on said mine.

Defendant admits that the said "Sunny South" location was made in the name of Frank Fagaly, J. A. Johnson, Lee Walker and H. C. Leeds.

Defendant denies that any of the above-named locations were to be held in trust by Leeds for him the said Wills to the extent of any interest whatsoever, for the reason that defendant denies that he had in any way entered into or been made a party to any agreement whatsoever with said complainant Wills, whereby said complainant Wills should have any interest whatsoever in said mining claims.

Defendant admits that one Frank Fagaly located said claims and signed the names of the locators to said notices.

Defendant admits that he the said defendant and one Leeds caused the notices to be recorded in the said recorder's office.

This defendant further answering says that it may be true for anything this defendant knows to the contrary that defendant Fagaly has caused other claims to be located in said district in the vicinity of said claims hereinbefore described, at least three in number, and that he may have caused several other claims to be located, but this defendant is an utter stranger to all and every such matters, and can form no belief concerning the same.

Defendant admits that he is entitled to two-fifths interest in said claims.

Defendant admits that there is filed of record as described in said complainant's bill in the office of the recorder of said county

145 in Book "F" page 302 of the mining records, *and* declarations by said Fagaly, Leeds and Johnson agreeing that said defendant Walker is entitled to two-fifths of said claims.

And this defendant further answering upon his oath denies that he has ever, or at any time conspired with one Fagaly to defraud complainant out of any interest that he said complainant might have or which had been given him in locating mines in said district in pursuance of any agreement whatsoever.

Defendant admits that he did under his own name and for himself and without any agreement whatsoever with any other person and without any intent to defraud complainant or any other person whatsoever cause to be located a certain mining claim known as the "Golden Era" situated in said county and district.

Defendant denies that said complainant is entitled to or had at any time by any agreement, contract or otherwise been entitled to any part or parcel of interest in and to the said location known as the "Golden Era" mine.

Defendant admits that said location notice of the "Golden Era" mine is recorded in Book "F" at page 10 of the mining records of said county in the recorder's office of said county with a description given there as stated in complainant's bill is true to the best of this defendant's knowledge and belief.

This defendant further answering says, that he denies that defendant Fagaly in the presence of this defendant Lee Walker, this defendant Lee Walker assenting thereto agreed with complainant Wills that the said Wills was upon the ground to locate said last-
mentioned claim to wit the "Golden Era" claim pursuant to
146 the terms of the agreement mentioned in complainant's bill or in pursuance of any other agreement whatsoever with said complainant.

Defendant further denies that the said location of the "Golden Era" claim was made in pursuance of any understanding of any nature whatsoever with the said Wills, or with any other person.

Defendant denies that he expressly agreed to locate this particular ground as aforesaid, or that after when complainant had left the locality and returned to his home for the purpose of procuring tools the said defendant in fraud of the rights of the complainant located the last-mentioned claim in the name of himself alone—that is, the said Walker alone.

Defendant denies that said Wills ever entered into any agreement with him for the procuring of tools of any kind or for any purpose whatsoever.

This defendant admits that he located the claim in the name of this defendant Lee Walker alone.

He admits that he denied that the complainant or his codefendants Johnson and Leeds had any interest in the "Golden Era" claim.

Defendant further denies that he in any way recognized the said defendant Fagaly as having an interest in said claim, to wit, the "Golden Era."

Defendant denies that the same was located in the name of said Walker by combination and agreement between the said Fagaly and Walker to defraud the aforesaid complainant or his codefendants.

Defendant denies that he has given out or claimed that the said

Pilkey is interested in his two-fifths interest of said claim located as aforesaid and the other claims hereinbefore referred to.

This defendant further answering says it may be true for anything that this defendant knows to the contrary that defend-
147 ant- Leeds and Johnson recognize the interest of said complainant in and to said mining claims and are ready and willing to carry out their agreement with complainant, but this defendant is an utter stranger to all and every such matters and cannot form any belief concerning the same.

And this defendant further answering says, that he denies that he has in any way whatsoever entered into any collusion with defendant- Mills and Dougin or in any manner instigated or procured them to make new locations upon the claims aforementioned nor has conspired or agreed in any manner with the said Mills and Dougin to jump said claims or that they the said defendants Mills and Dougin should have any interest in said mines by reason of said new locations.

Defendant denies that he has any interest or is in any way to be benefited by the pretended new locations made by said Mills and Dougin.

Defendant admits that the said claim last mentioned was not open to entry or location at the time said defendants Mills and Dougin entered thereon and attempted to locate the same.

Defendant denies that he has worked, extracted and was removing valuable ores of gold and silver from said mine or mines at the time of the filing of complainant's bill.

Defendant admits and believes it to be true that some of the claims aforesaid contain gold and silver ore of great value.

Defendant further answering says that it may be true for anything this defendant knows to the contrary that the location notices signed or intended to be signed J. Johnson which were intended to
mean Julia Johnson, the wife of the defendant J. A. Johnson
148 belonged to or intended to belong to Julia Johnson, but this defendant is an utter stranger to all and every such matters and cannot form any belief concerning the same.

And the said defendant further answering denies as a matter of fact that any location had been made prior to the time mentioned in said complainant's bill of complaint as being in the month of December, 1893.

And this defendant further avers and state- it to be a fact that the locations made sufficiently describe the claim and ground intended to be located a long time prior to the date alleged in said complainant's bill wherein he states that he caused certain so-called amended locations to be filed upon said claims.

Defendant further answering denies that he ever procured any blanks of said complainant Wills which said blanks were filled up and filed on certain days in the month of December, and he absolately and wholly denies that the said Wills ever procured for him upon his request or otherwise, any blank notices of locations for any mines whatsoever in the said county and district.

Defendant further answering denies that any of his acts and

doings, the said acts and doings have been in fraud of the rights of complainant as in his bill alleged for the reason that said complainant never had any rights in and to said mining claims in which this defendant was interested in said mining district as above stated so far as this defendant knows.

Defendant further denies that he ever proposed or had any purpose of defrauding complainant out of any interest in said claims for so far as he knows and upon his knowledge and belief said complainant never had any interest in said mining claims or the location thereof.

149 Defendant further denies that he ever combined or confederated with one Frank Fagaly, Charles Pilkey, T. M. Mills or Dougin or with divers other persons to injure complainant or oppress him in any of his rights that he might have in said claims.

And this defendant denies all and all manner of combination and confederacy, wherewith he is by the said bill charged, without this that there is any other matters, cause or thing in the complainant's said bill of complaint contained, material or necessary for this defendant to make answer unto and no- herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied is true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain and prove, as this honorable court shall direct; and prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

(Signed) LEE WALKER.

W. C. HEACOCK,
Solicitor for Defendant Lee Walker.

TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

On this 10th day of March, A. D. 1894, personally appeared Lee Walker, and made oath that he has read the above answer subscribed by him, and knows the contents thereof and that the same is true of his own knowledge, except as to matters which are therein stated to be on his information and belief, and as to those matters he believes them to be true.

[NOTARY SEAL.] (Signed) LEE WALKER.

Subscribed and sworn to before me this 10th day of March, A. D. 1894.

(Signed) DONACIANO CHAVES,
Notary Public.

150 (Endorsed:) "Filed in my office this 13th day of Mar., 1894. (Signed) O. N. Marron, clerk.

Counsel for plaintiff offers in evidence and introduces Exhibits "A," "B," "C," "D" and "E," referred to and made a part of bill of complaint (Exhibit 9 of this record) over the objection and exception of counsel for defendants already noted.

Same is marked in this record "Exhibit 11," read to the jury, and — as follows:

EXHIBIT 11—INTRODUCED AND READ IN EVIDENCE.

"EXHIBIT A"—NOTICE OF LOCATION.

The undersigned citizens of the United States, over the age of twenty-one years, having complied with all the requirements of the United States and territorial laws now in force relative to mineral location, and with all local customs and regulations in force — relation to such locations, have located and do hereby claim by right of discovery and location 1,500 linear feet on and along this lode, vein deposit of mineral-bearing rock in place, together with three hundred feet of surface ground along and on each side of said 1,500 feet.

The claim hereby located is situated in the Cochiti mining district, county of Bernalillo, New Mexico, and more particularly described as follows:

Beginning at a post No. 1, erected on said lode, lead and deposit, said post being the north end center monument of this claim, and being the center of the north line of said claim marked "north end center post;" thence east 300 feet to the northeast corner post No. 2 marked "northeast corner post;" thence south 1,500 feet to post No. 3 southeast corner post, marked "southeast corner post;" thence west 300 feet to post No. 4 marked "south end center post;"
151 thence 300 feet to post No. 5 marked "southwest corner post;" thence north 1,500 feet to post number 6 marked "northwest corner post;" thence east 300 feet to the place of beginning. All of said marks being in pencil. And the discovery shaft of said claim being located within the exterior lines thereof and on the lode or lead located, upon which said discovery shaft is posted a copy of this notice of location, and — the monument of stone around the north end center post is also posted a copy thereof. And around all of said posts referred to are piles of stone. Said claim being about 2 miles north of Peralta mountains.

This claim is located in the said mining district about 15 feet in a southeast direction from a big pine tree marked with a blaze.

This location is an amended location of said claim, the original thereof having been made on the 23rd day of October, 1893.

This amended location is made on the 16th day of December, A. D. 1893. Said claim shall be known as the "Washington lode."

F. FAGALY,
LEE WALKER,
H. C. LEEDS,
J. JOHNSON, *Locators.*

Filed for record December 30th, 1893, at 10 a. m. and recorded January 15th, 1894.

"EXHIBIT B"—NOTICE OF LOCATION.

The undersigned, citizens of the United States, over the age of 21 years, having complied with all the requirements of the United States and territorial laws now in force relative to mineral
152 location, and with all local customs and regulations in force relative to such locations, have located and do hereby claim by right of discovery and location 1,500 linear feet on and along this lode, vein, deposit of mineral-bearing rock in place, together with 300 feet of surface ground along and on each side of said 1,500 feet.

The claim hereby located is situated in the Cochiti mining district, county of Bernalillo, New Mexico, and more particularly described as follows:

Beginning at a post No. 1 erected on said lode, lead and deposit, said post being the north end center monument of this claim, and being the center of the north line of said claim marked "north end center post;" thence east 300 feet to the northeast corner post No. 2 marked "northeast corner post;" thence south 1,500 feet to post number 3 southeast corner post, marked "southeast corner post;" thence west 300 feet to post number 4 marked "south end center post;" thence 300 feet to post No. 5 marked "southwest corner post;" thence north 1,500 feet to post number 6 marked "northwest corner post;" thence east 300 feet to the place of beginning, all of said marks being in pencil, and the discovery shaft of said claim being located with the exterior lines thereof and on the lode or lead located, and upon which said discovery shaft is posted a copy of this notice of location, and in the monument of stone around the north end center post is also posted a copy thereof, and around all of said posts referred to are piles of stone. Said claim being about 2 miles north of Peralta mountain.

This claim is located in the said mining district about 20 feet in a north direction from a big pine tree marked with a blaze.

This location is an amended location of said claim, the
153 original thereof having been made on the 24th day of October, 1893.

This amended location is made on the 21st day of December, A. D. 1893. Said claim shall be known as the "North Star lode."

Located by—

F. FAGALY,
J. A. JOHNSON,
H. C. LEEDS,
LEE WALKER, *Locators.*

Filed for record December 30th, 1893, at 10 a. m. and recorded January 16th, 1894.

"EXHIBIT C"—NOTICE OF LOCATION.

The undersigned, citizens of the United States, over the age of 21 years, having complied with all the requirements of the United States and territorial laws now in force relative to mineral locations,

and with all local customs and regulations in force relative to such locations, have located and do hereby claim by right of discovery and location 1,500 linear feet on and along this lode, vein deposit of mineral-bearing rock in place, together with 300 feet of surface ground along and on each side of said 1,500 feet.

The claim hereby located is situated in the Cochiti mining district, county of Bernalillo, New Mexico, and more particularly described as follows:

Beginning at a post No 1 erected on said lode lead and deposit, said post being the north end center monument of this claim, and being the center of the north line of said claim marked "north end center post;" thence east 300 feet to the northeast corner post No. 2 marked "northeast corner post;" thence south 1,500 feet to
154 post number 3 southeast corner post, marked "southeast corner post;" thence east 300 feet to post number 4 marked "south end center post;" thence 300 feet to post number 5, marked "southwest corner post;" thence north 1,500 feet to post number 6 marked "northwest corner post;" thence east 300 feet to the place of beginning. All of said marks being in pencil, and the discovery shaft of said claim being located within the exterior lines thereof and on the lode or lead located, and upon which said discovery shaft is posted a copy of this notice of location, and in the monument of stone around — all of said posts referred to are piles of stone.

Said claim being about 2 miles north of Peralta mountain, Cochiti mining district, Bernalillo county, New Mexico.

This claim is located in the said mining district, about 60 feet from the north end center where location-line paper is nailed to pine tree about 60 feet south of north end center line — direction from a big pine tree marked with a blaze.

This location is an amended location of said claim, the original thereof having been made on the 20th day of October, A. D. 1893. Said claim shall be known as the "Sunny South lode."

Located by—

F. FAGALY,
J. A. JOHNSON,
H. C. LEEDS,
LEE WALKER, *Locators.*

Filed for record December 30th, 1893, at 10 a. m. and recorded January 15th, 1894.

"EXHIBIT D"—DECLARATION.

155 We the undersigned hereby acknowledge that although Lee Walker is mentioned in the location notice as an even joint owner with us in several mining claims recently located by Frank Fagaly in the Cochiti mining district, in the Bernalillo or Santa Fé counties, New Mexico, that still he in truth and in fact is the owner of an undivided two-fifths interest in and to such several claims, and we each the owner of only an undivided one-fifth thereof. We hereby promise that as soon as proper description of said sev-

eral mining claims can be obtained, that we will make unto him good and sufficient deeds or instruments necessary or proper to fully vest him with such larger interest therein. Said claims are about 6 in number and are full-size 600 by 1,500 foot claims, and that the names of three of them that can be remembered at the present time at the hurried making of this acknowledge-, are the Washington, North Star and Sunny South mining claims.

H. C. LEEDS. [SEAL.]
J. JOHNSON. [SEAL.]
F. FAGALY. [SEAL.]

TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

On this 13th day of January, 1894, before the undersigned, personally appeared H. C. Leeds, J. Johnson and Frank Fagaly, to me personally known to be the same persons described in and who executed the foregoing instrument, and they acknowledge to me that they executed the same as their free act and deed.

In witness whereof I have hereunto set my hand and affixed my notarial seal the date last aforesaid, at my office in said county.

[SEAL.] F. M. SIMMS,
Notary Public.

156 "EXHIBIT E"—NOTICE OF LOCATION.

The undersigned we, citizens of the United States, over the age of 21 years having complied with all the requirements of the United States and territorial laws now in force relative to mineral locations, and with all local customs and regulations in force relative to such locations, have located, and do hereby claim by right of discovery and location, 1,500 linear feet on and along this lode, vein deposit of mineral-bearing rock in place, together with 300 feet of surface ground along and on each side of said 1,500 feet. The claim hereby located is situate in the Cochiti mining district, county of Bernalillo, Territory of New Mexico, and is more particularly described as follows:

Beginning at a monument of stones (monument No. 1) erected on said lode, lead and deposit; said monument number 1 being the north end monument of this claim, and being the center of the north end line of said claim; thence east three hundred feet to a monument of stones (No. 2); thence south 1,500 feet to a monument of stones (No. 3); thence west 300 feet to a monument of stones (No. 4); said monument number 4 being the south end monument and the center of the south end line of this claim; thence west 300 feet to a monument of stones (No. 5); thence north 1,500 feet to a monument of stones (No. 6); thence east 300 feet to the place of beginning.

And for further description lies on the south side of the Peno canyon runs north and south, lies 2 miles north of Peralta mountain running 1,300 feet south from location post and 200 feet north from location post.

This claim was located the 7th day of November, A. D.
157 1893, and shall be known as the Golden Era mine. A copy of this notice is placed on monument location post.

Located by—

LEE WALKER, *Locator.*

(Diagram of claim.)

Notice posted in presence of R. Q. Marksbury, witness.

(Said Exhibits "A," "B," "C," "D," and "E" are attached, constituting this "Exhibit 11" of this record, and are endorsed as follows:) Filed in my office this 5th day of February, 1894. O. N. Marron, clerk.

Counsel for plaintiff offers and introduces in evidence over the same objections and exceptions of counsel for defendants the joint answers of Julia Johnson, J. A. Johnson and H. C. Leeds, to the bill of complaint heretofore introduced. Counsel for defendants makes a further objection to all the exhibits introduced from said case No. 3795, James Q. Wills *vs.* Frank Fagaly, *et al.* on the ground that the same are not material to the issue. Said answers now introduced were marked "Exhibit 12;" such portions only read to the jury as will be enclosed in brackets, but the whole of same were introduced, and are as follows:

"EXHIBIT 12."

(Introduced in evidence and a portion read.)

TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

In the District Court.

JAMES Q. WILLS }
vs. } No. 3695.
FRANK FAGALY ET ALS. }

The answer of Julia Johnson, J. A. Johnson, and H. C. Leeds, defendants, to the amended bill of complaint of James Q. Wills, complainant.

158 These defendants, now and all times hereafter, saving and reserving unto themselves all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties and other imperfections in the said amended bill contained, for answer thereunto, or to so much and such parts thereof as these defendants are advised it is or are material or necessary for them to make answer unto, answering say:

They admit that on or about the 20th day of October, 1893, an agreement was entered into by and between them and the defendants Fagaly and Walker and the complainant Wills, to prospect and locate mining claims in said Cochiti mining district, and that said agreement was verbal, and was first made by the defendant Leeds and the said complainant, and thereafter by this defendant and the

other defendants, and said agreement was subsequently ratified and recognized by and between complainant and all of said defendants, and that by the terms of said agreement it was understood by and between complainant and the defendants, that the said complainant should assist the said defendants by furnishing money, tools and provisions and assisting in any other way in his power in prospecting and locating certain mines of gold, silver and other precious metals, the location of which said metals *were* supposed, from information which had been received, to be located in the section of said county of Bernalillo as aforesaid, in said mining district, as aforesaid, and in consideration of which said money, tools and assistance to be rendered and furnished by the said complainant, it was agreed and understood that the said complainant should have
an interest in all claims located by these defendants and their
159 codefendants in said mining district as aforesaid.

(Defendants further answering admit that the agreement made by and between this defendant Leeds and the complainant, and afterwards ratified and agreed to between the other parties, that the said defendants should prospect said section of country and locate mining claims therein, and if any valuable deposits or indications of valuable deposits should be discovered, that the said defendants should be interested in said claims to the extent of a one-fifth interest each respectively, and admit that thereafter the defendant Leeds agreed with the complainant, that in consideration of the money and assistance to be rendered as aforesaid, he would secure an interest in said locations for said complainant, and this defendant Leeds further admits that on his part he agreed with the complainant, that of the one-fifth interest in any claims located which should belong to him, he the said complainant should have an undivided one-twentieth interest in such interest, and this defendant further admits, that he further agreed with the said complainant that he would secure for him a like interest in any claims so located from his codefendants Fagaly and Johnson; in other words, that out of the one-fifth interest in said claims, which under said original agreement should and would belong to his codefendants Johnson and Fagaly, that one-twentieth each should be set apart for the said complainant, making the interest of the said complainant and these defendants and their codefendants Fagaly in said claims so located, each an undivided three-twentieths, and further answering admits, that the said defendant Pilkey and Walker should have their original one-
fifth interest each in said claims.)

160 (Further answering, defendants admit the entering into of said agreement as aforesaid, and that they all, with the exception of the defendants Mills and J. T. Dougine agreed with the said complainant, that he should have said interest as aforesaid; that is to say, that out of all claims so located in said district, the said complainant should have a three-twentieths and these defendants three-twentieths, and their codefendants Fagaly three-twentieths, and the said Walker and Pilkey each a fifth.)

(Further answering defendants admit that in pursuance of said agreement, the complainant furnished to their codefendant Fagaly

in cash the sum of one hundred and forty dollars, and furnished to said defendants Fagaly, Walker and Pilkey, tools and other supplies to the amount in full of twenty dollars and forty-one cents; and that the said defendants, in pursuance of said agreement, accepted said money and tools and proceeded to locate certain mining claims in said Bernalillo county, in the vicinity of said Cochiti mining district, to wit, the Washington lode, but further answering, these defendants say that they did not give out or claim that the location of said Washington lode bore date the 23rd day of October, 1893, and further answering, they allege, that in the month of December, the complainant caused to be prepared location notices in blank and furnished them to their codefendant Fagaly, which said defendant Fagaly filled up and posted upon said mines and mining claims, and on the Washington lode posted up said location notice on the 16th day of December, 1893, and that thereafter, the same was caused to be recorded in the office of the probate clerk and *ex officio* recorder of Bernalillo county; and these defendants further allege,

161 that they themselves furnished money, tools and supplies to be used in and about the locating of said mines for the use and benefit of the parties interested, in accordance with said agreement to the sum of two hundred and two dollars and seventy-one cents.)

Further answering these defendants admit, that no other notices had ever been posted upon said lodes or mining claims prior to the preparation of the said blank notices of location, which the said complainant caused to be prepared by his attorney, and they admit that prior to the posting of the same on said mining claims, in the month of December, 1893, said claims had not been staked or located in any manner upon the ground, nor had any of them entered into the possession of the same, but they allege, that prior to that time they had been engaged in prospecting the same, but they allege, that while the said blanks state that the same are an amended location, still these defendants allege that there was no location and that the one filed in December and afterwards recorded as hereinbefore alleged, was the only location made on said claims, and that no other or prior locations were made or sufficient notice posted upon said claims or recorded in the office of the county recorder of Bernalillo county, in which said county said claims were located; and further answering, allege, that no monument upon the ground had been placed so as to trace the boundaries as required by law.

(Further answering, they allege, that the first of said location notices was posted upon the claim called the Washington lode, on the 16th day of December, 1893, and was filed for record on the 30th

162 day of December, as in said amended bill of complaint alleged; and further answering allege, that by the filing of said location notice and the recording of the same, they located the Washington lode, situated in said county of Bernalillo in the Cochiti mining district, and admit that the description as set forth in the bill of complaint, of said Washington lode, is correct.)

Defendants further answering admit that they together with their codefendant caused to be located another mining claim situated in

said county and Territory, known as the "North Star lode," and that the description set forth in said amended bill of complaint is correct, and they further admit that they together with their codefendants afterwards likewise caused to be located another mining claim known and called the "Sunny South," and that the description set forth in said amended bill of complaint of said last mentioned claim is likewise correct, and they admit the recording of the said location notices of the said Washington lode, North Star and Sunny South, in the recorder's office of Bernalillo county, as therein set forth, and admit that the notices of location of said mining claims were signed as in said amended bill of complaint set forth.

(Defendants further answering allege, that the said defendant Fagaly shipped out of the Washington mine, ore and disposed of the same, but as to whether or not he has accounted to the said complainant Wills for any portion of the proceeds thereof, they are not informed, and these defendants further allege that the said defendant has made a statement to them as to the amount received from said shipment but they do not know of their own knowledge how much was received, or how much the same netted. They further allege that the defendant Fagaly gave to defendant Leeds thirty-seven dollars and fifty cents but said sum was not paid
163 on account of said shipment of ore but on account of moneys advanced to said Fagaly to pay the expenses of locating said mines, the said sum being on account of Fagaly's share.)

(Defendants further answering, allege that the understanding on their part with reference to the location of said mining claims, was as set forth by the complainant in his bill of complaint, that the interests of the said complainant was to be held in trust by these defendants and their codefendants, the locators of said mining claims.)

These defendants further answering allege that they have been informed and believe that the said defendant Fagally gives out and pretends that complainant was not to have any interest in any portion of said mining claims so located, and that he refuses to recognize said complainant as having any interest therein, and has refused to convey any interest to said complainant, and refuses to account for any of the money, tools and implements furnished by him as aforesaid in accordance with said agreement.

Further answering these defendants admit that the said defendant Fagaly was the person who actually located said claims and signed the names of the locators to said notices, and they admit that they procured the notices of location of the mining claims, as in said amended bill of complaint described, and caused the same to be filed for record in said recorder's office.

Further answering, these defendants likewise admit, that they are informed and believe, that the defendant Fagaly, has caused other claims to be located in said mining district and in the vicinity of the claims in said amended bill of complaint described, at
164 least three in number, and further admit, that the said defendant Fagaly has admitted to these defendants that he has located at least three other claims in number, and they further

answering admit that they are not informed, but believe that the said defendant Fagaly has likewise caused to be located other claims than the three which he has admitted to have so located, and they likewise admit that the said defendant Fagaly has failed and refused to cause said location notices to be recorded in the recorder's office, as required by the laws of the United States and the Territory of New Mexico, and further answering these defendants admit that the said claims so located are subject to the agreement made by and between them and the complainant and said defendant Fagaly, and further answering, they admit that the said Fagaly has admitted the making and locating of at least three other claims in addition to the ones described, in writing, which said writing was executed by the defendant Fagaly and these defendants, and admit that by its terms it recognizes and declares that the defendant Walker was entitled to a two-fifths interest in said claims, and admit the filing and recording of the same as in said bill of complaint set forth.

Defendants further answering admit, that the said defendants Fagaly and Walker, or at least the said Walker, has caused to be located another mining claim, under the name of the Golden Era, situated in said county and in said district, as in said bill of complaint alleged, and the location notice thereof is recorded, as therein set forth, and these defendants allege, that in accordance with the agreement, they are entitled to their interests in said Golden Era claim, and that the complainant is likewise entitled to his
165 interest in accordance with the agreement made and entered into by and between them as aforesaid.

Defendants further answering, state that they do not know whether or not the said Fagaly, in the presence of said Walker, and that the said Walker assented thereto, agreed with the complainant, when the complainant was present upon the ground, to locate said last-mentioned claim in pursuance of the terms of said agreement between said complainant and the defendants as aforesaid, and that, nevertheless, after expressly agreeing to locate this particular ground as aforesaid, and after complainant had left said locality and returned to his home for the purpose of procuring tools and sending to said defendants, yet the said defendants Fagaly and Walker, disregarding their said agreement, and in fraud of the rights of the said complainant, located said last-mentioned claim in the name of the said Walker alone, and that the said Walker and Fagaly therefore deny that said complainant has any interest therein. These defendants allege the fact to be, that they are informed and believe, that the said Fagaly and Walker have failed and refused to recognize these defendants as having any interest in said Golden Era mining claim, but further allege, that they are entitled to their interest in said mining claim, and that the said complainant is also entitled to his interest in said mining claim in accordance with the agreement aforesaid.

Further answering defendants allege, that they are also informed, that the said defendant Walker recognized the said defendant Fagaly as having an interest in said last mentioned claim, and while

they are not fully advised in the premises, yet they believe,
166 that the location of such claim in the name of Walker alone, was done for the purpose of defrauding complainant, and so far have also ignored the rights of these defendants in and to the same.

(Further answering defendants allege, they are also informed and believe, that the said Walker gives out and claims that the defendant Pilkey is interested in his two-fifths of said claims located as aforesaid, and the other claims referred to, and defendants allege, that it was their understanding that the said defendant Pilkey should likewise have an undivided one-fifth interest in and to any and all mining claims which may be located, and that at the time of the entering into of the agreement in writing whereby they recognized the said Walker as having a two-fifths interest in said property, they allege, they do not know what arrangements were made by and between the said Walker and Pilkey with reference to said Pilkey's interest, but are informed and believe, that the said Pilkey claims some interest therein.)

Further answering these defendants admit, that they recognize the interest of the said complainant in and to said mining claims, and are ready and willing to carry out their agreement with the said complainant, and to convey to him his interest in said mining claims, whenever requested so to do.

Further answering, defendants admit, that they are likewise informed, that the defendant Fagaly gives out that he has caused the "North Star" and "Sunny South" mining claims in said amended bill of complaint described, to be relocated in the names of other persons, and these defendants allege, that if such be true, that such action on the part of the said Fagal*ly* is contrary to equity, and if such has been done, that it is undoubtedly for the purpose
167 of defrauding these defendants as well as the said complainant out of their interests in said claims.

Further answering, these defendants admit, that they are informed that T. B. Mills and J. T. Dougine jumped the claims, in said amended bill of complaint described as the "Sunny South" and "North Star," and pretend to have located said claims, and pretend and claim that the ground described as aforesaid, and located as aforesaid, as in said amended bill of complaint alleged, is open for location, and these defendants further allege, that they believe, that if said mines have been jumped or attempted to be located by the said defendants Mills and J. T. Dougine, that the same is done in collusion with, and at the instigation and procurement of the said Fagaly, Walker, and Pilkey; but they further allege, that the ground was not open to entry and location at the time that the said defendants Mills and J. T. Dougine entered upon and attempted to locate the same, and they admit that they are informed and believe, that the said defendants Mills and J. T. Dougine are in possession of said ground and claims, and refuse to permit these defendants and the complainant to enter therein for the purpose of doing the work upon the same, and that they likewise refuse to permit the complainant and these defendants from entering therein

and sinking a shaft, and doing other work as required by the statutes of New Mexico in order to perfect the location of said claims as required by the statute.

Further answering these defendants admit, that if the defendants Walker, Pilkey, and Fagaly, are causing more claims to be located and work-, or are extracting and removing valuable ores of gold and silver therefrom, complainant is entitled to his interest therein, and they admit that some of said claims contain gold and silver
168 ore of great value, and further answering admit that the defendants Fagaly, Walker, and Pilkey and Mills and J. T. Dougine are men of no means whatsoever, and further admit that the said defendant J. T. Dougine is not a resident of the Territory of New Mexico, and they know of no property that he owns or possesses in said Territory, and they likewise admit, that a judgment against any of said last-mentioned defendants would be unavailing.

Further answering, these defendants admit, that some of the location notices were signed or intended to be signed J. Johnson, which said signature was signed or intended to mean the defendant Julia Johnson, the wife of the defendant, J. A. Johnson, and that any interest- in said claims so located standing in the name of J. Johnson, or J. A. Johnson, belong to or are intended to belong to this defendant, Julia Johnson.

Furtner answering, these defendants admit that the location notices were prepared in blank by the plaintiff's attorney, but they are not informed as to whether or not the complainant had no knowledge of the exact facts with reference to the location of said claims, and he expected the same would be used as amended locations, when as a matter of fact no location at that time had been made upon said mines or mining claims, and admit that as a matter of fact, no location of said mining claims had been made at the time of the filing of the location notices hereinbefore referred to in the month of December, and further admit that no preliminary notices of intention to locate said claims had been posted thereon which sufficiently described the claim or ground intended to be thereafter located, and that no preliminary notice had been
169 made or filed by the said claimants, until the said blanks so prepared by the complainant were filled out and filed, as aforesaid, on the days of the month of December, as in said bill of complaint alleged.

Defendants further answering, allege, that such acts, and doings on the part of the said Fagaly, Walker, Pilkey, Mills and Dougine, if true, as set forth in said amended bill of complaint, are in fraud of the rights of the complainant, and for the purpose of defrauding him out of his interest in said claims, and defendants further answering allege that they well hoped that no disputes would have arisen touching the location of such mining claims, and the recognition of the interests of all parties, and the carrying out of said agreement by and between them, and that they have always been ready and willing on their part to comply with the said agreement and the reasonable requests of said complainant, as in conscience and equity they were bound to do.

Defendants therefore admit, that the complainant is entitled to the relief as therein prayed for and these defendants likewise join with the said complainant in his prayer for the issuance of an injunction restraining and enjoining their codefendants from selling, transferring, encumbering, and from extracting ore or removing the same from said mines and also for the appointment of a receiver of the said property, and for an order authorizing the parties interested in said mines to do the necessary work upon the same as required by the laws of the Territory of New Mexico, and of the United States, and upon the failure of the parties to agree to have said work done, that a receiver may be authorized and instructed to do the work for the benefit of all parties interested.

170 And these defendants deny all and all manner of unlawful combination and confederacy wherewith they are by the said bill charged, without this that there is any other matter, cause or thing in the complainant's amended bill of complaint contained, material or necessary for these defendants to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of these defendants; all which matters and things these defendants are ready and willing to aver, maintain and prove, as this honorable court shall direct; and pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

E. W. DOBSON,
Solicitor for Defendants.

J. A. JOHNSON,
JULIA JOHNSON, AND
H. C. LEEDS.

TERRITORY OF NEW MEXICO, } ss:
County of Bernalillo, }

H. C. Leeds being duly sworn, upon oath deposes and says that he has heard read the foregoing answer and knows the contents thereof, and that the same are true, except as to such matters as are therein stated to be upon information and belief, and as to those he believes them to be true.

(Signed) H. C. LEEDS.

[NOTARY SEAL.] Subscribed and sworn to before me this 26th day of February, A. D. 1894.

(Signed) E. L. MEDLER,
Notary Public.

(Endorsed on back:) Filed in my office this 26th day of February, 1894. O. N. Marron, clerk.

Admission as to "Exhibit B."

It is admitted by counsel on both sides that "Exhibit B"
171 (made a part of bill of complaint, Exhibit 9, and also introduced as part of Exhibit 11 of this record) the same being

the agreement executed by Fagaly, Johnson and Leeds with defendant Walker, acknowledging that under the location notices of the Washington, signed by the four, Walker was the owner of a two-fifths interest and the other three locators each entitled to one-fifth, was recorded on January 13th, 1894, in the recorder's office of Bernalillo county, New Mexico.

Counsel for plaintiff offers in evidence and the same is introduced, the order of this court appointing Charles Bonsall receiver of the Washington mine, in the case of Wills *vs.* Fagaly *et als.*, No. 3795, which was made on the 18th day of May, 1894, which was marked "Exhibit 13" and is as follows, the contents being stated to the jury without reading:

"EXHIBIT 13."

Introduced in evidence and substance stated to jury.

TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

In the District Court.

JAMES Q. WILLS }
vs. } No. 3795.
FRANK FAGALY ET ALS. }

Order Appointing Receiver.

This cause coming on to be heard upon the motion of the complainant, James Q. Wills, and cross-complainants H. C. Leeds, J. A. Johnson and Julia Johnson, and the defendants Lee Walker, for the appointment of a receiver for the Washington mine, and the said J. Q. Wills, and cross-complainants Leeds and Johnson being represented by their respective solicitors W. B. Childers and
172 E. W. Dobson, Esqrs., and the said Lee Walker, by his solicitor W. C. Heacock, Esq., and defendant Frank Fagaly being represented by H. L. Warren, Esq., who appeared in opposition to the appointment of such receiver, and protest against the same, and the court having heard counsel and being fully advised in the premises, doth order, adjudge and decree, that Charles Bonsall, be and he is hereby appointed receiver of the Washington mine in accordance with the prayer of said motion, and a said receiver be and he is required to give bond in the sum of $1,000.00 for the faithful performance of his duties as such receiver, with two good and sufficient sureties, to be approved by the court; and upon the giving of said bond, be and he is hereby authorized and instructed to take possession of the said mining claim as surveyed by W. G. Marmon, except such portions of said claim as are in the hostile, adverse possession of persons not parties to this cause, and he be and is hereby further instructed to do all and every act necessary to hold the actual adverse possession of all portions of said claim which may come into his possession under this order, against all

persons whomsoever, in order that the right of the parties to this suit in and to the same may be fully protected against the claims of all other persons whomsoever.

And said receiver is further ordered and instructed to report to the court what portions, if any, of said claim, he may find in the adverse possession of any other person and who such persons are and what possession they may have or acts of possession they may be engaged in doing, in order that the court and parties to this suit may be fully advised in the premises, and that said receiver may be further ordered and instructed by the court as to what he
173 shall do in regard thereto, or what shall be done by him with reference to other portions of said claim.

And said receiver is further notified to post conspicuously upon said claim, notice of his appointment as receiver and a copy of this order, and to notify all persons, if any, now upon said claim, or whom he may ascertain are setting and alleging any rights in the same, of his appointment as such receiver.

It is considered by the court that in making this order, that the said defendant Frank Fagaly, has protested against the appointment of said receiver, and the question of the expense of said receivership is reserved by the court for its future determination in view of the fact that the said defendant Fagaly has so protested.

(Signed) N. C. COLLIER, *Judge.*

(Endorsed:) Filed in my office this 18th day of May, 1894. O. N. Marron, clerk.

Adjournment until 1.30 p. m.

Counsel for plaintiff offers in evidence the answer of defendant Frank Fagaly and Chas. Pilkey in suit No. 3795 in which J. Q. Wills is the complainant and Frank Fagaly and others are the defendants, and only asks that such portion be read to the jury as is marked in pencil on original Exhibit 14, although the whole is introduced.

Counsel for defendants makes the same objection as to other answers in suit No. 3795, and saves his exception.

The portions marked in pencil on the original exhibit which were read to the jury are indicated in this copy into the rec-
174 ord from same by being enclosed in brackets. Said answer was marked Exhibit 14, and is as follows:

"EXHIBIT 14."

(Introduced in evidence and a portion read.)

TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

In the District Court, Second Judicial District.

The joint and several answer of Frank Fagaly and Charles Pilkey, impleaded with Lee Walker, H. C. Leeds, J. A. Johnson and Julia A. Johnson, his wife; T. B. Mills, and J. T. Dougine, defendants, to the amended bill of complaint of James Q. Wills, complainant.

These defendants, Frank Fagaly and Charles Pilkey, for answer to the amended bill of complaint of James Q. Wills, complainant, or to so much thereof as these defendants are advised it is material or necessary for them to make answer unto, answering say: That it is not true and these defendants deny that the said complainant did on or about October 20th, 1893, or at any other time, enter into an agreement with these defendants or either of them together with defendants Walker, Leeds and Johnson or with any other person to prospect and locate mining claims in the northeast portion of the said county of Bernalillo in the vicinity of the town called Cochiti and in the Cochiti mining district, as in said bill alleged; and these defendants have not any knowledge or information sufficient to form a belief as to what agreement if any was made by the complainant with defendant Leeds, but deny that said pretended agreement if made by said Leeds was ever in any manner subsequently or at any time ratified or recognized by these defendants or either of them as alleged, and they deny that, by the terms of said alleg-d agreement or of any agreement whatever that it was
175 agreed and understood by and between the complainant and these defendants or either of them that the complainant should assist these defendants by furnishing money, tools and provisions, and assist in any way in prospecting and locating certain mines of gold, silver and other precious metals, in said mining district and in said section of said country, and they deny that in consideration of said alleged money, implements and assistance to be furnished by said complainant, or for any other consideration it was at said time, or any other time whatever ever agreed and understood that the complainant should have an interest in any or all claims located by these defendants or either of them in said district and section of country.

And these defendants further answering say, that they have not sufficient information to form a belief as to whether or not the defendant Hub. C. Leeds agreed with said complainant that said Leeds would secure an interest for location for complainant, but these defendants deny that said Leeds, for and on behalf of complainant, agreed with these defendants, or either of them, or that these defendants in any manner agreed with said complainant or any one on

his behalf, that of the one-fifth or any other interest in any claims located, which should belong to said Leeds and defendants Fagaly and Johnson, he, the complainant should have an undivided one-twentieth or any other interest whatever in said claims as in and by said bill alleged; and they deny that it was ever in any manner agreed that the said complainant should be entitled to one-twentieth or any other interest in and to any mining claims, which should and would belong to said defendant- Leeds, Johnson and Fagaly, as alleged in the complainant's bill.

176 Defendants further answering deny that these defendants in any manner entered into and made or were parties to said agreement with complainant and they deny that they or either of them thereafter or at any time agreed with the said complainant that he, the said complainant, should have three-twentieths interest, or any interest whatever, out of all or any claims located in said district by or on behalf of these defendants or either of them, as in said complainant's bill alleged.

Defendants further answering, deny that in pursuance of said alleged agreement complainant furnished to defendant Fagaly in cash the sum of one hundred and forty dollars or any other sum, and furnished to defendants Fagaly, Walker and Pilkey tools and other supplies to the amount in full of $21.40, or to any other amount; and they deny that these defendants, in pursuance of said pretended agreement accepted said money and tools and proceeded to locate the mining claims in said Bernalillo county, in the vicinity of said town of Cochiti and in the said Cochiti mining district, in complainant's bill mentioned, to wit: The Washington lode, the location notice of which is recorded in Book E, page 576 of mining records in the office of the recorder of said county; or the mining claim known as the North Star lode, the location notice of which is recorded in the office of said recorder in Book E, page 578, or the mining claim called and known as the "Sunny South," the location notice of which is recorded in Book E, on page 577, in said recorder's office; or any other mining claims or locations whatsoever.

177 Defendants admit that defendant Fagaly refused to recognize complainant as having any interest in said mining claim and refuses to convey any interest to complainant, and deny that any money, tools and instruments were ever furnished by complainant to defendant Fagaly individually or in connection with said other defendants under and in accordance with any agreement to which said Fagaly was a party in manner and form as alleged in said bill.

The said defendants say it is true that defendant Fagaly has shipped ore out of said Washington mine and disposed of the same and refuses to account to complainant for the same; and they deny that he has paid to complainant the sum of $25.00, or any other sum, on account of said ore, and these defendants deny that said complainant was or is entitled to any of the proceeds of said ore or of any ore extracted from said mine, under and by virtue of any agreement to which these defendants are parties.

These defendants say it is true that defendant Fagaly acting for

himself and his codefendants Walker, Leeds and J. A. Johnson, and for no other persons, actually located the claims in said bill mentioned and signed the names of the locators to the location notices, and that it may be true that defendant Walker and Leeds after procured and furnished new location notices as alleged in said bill, which were substituted for the original notices and filed for record, but these defendants claim that the complainant was no party to such substitution and that such fact if true is wholly immaterial and irrelevant.

These defendants further answering expressly deny that the defendant Fagaly has located or caused to be located any mining claims whatsoever in the said district and in the vicinity of the claims in said bill described *are which* subject to the agree-
178 ment in said bill mentioned or to any agreement whatsoever with complainant, which was recognized and assented to by defendant Fagaly as in said bill alleged.

Defendants further answering say it is true that defendant Fagaly together with defendants Leeds and Johnson executed the declaration or agreement in writting which is recorded in Book F, page 302 of mining records in said recorder's office, and of which Exhibit D filed with said bill, is a copy; but defendants allege that said complainant is no party thereto and that the same is wholly immaterial and irrelevant.

Defendants further answering deny that defendant Fagaly conspiring with defendant Walker or with any other person to defraud the complainant out of any interest agreed to be given him as alleged in locations made in said district, in pursuance of any agreement whatever caused another mining claim, called the "Golden Era," situate in said county and district, and in said bill described, to be located by and in the name of defendant Walker; and they deny that said Fagaly, in the presence of said Walker, agreed with complainant when he was present upon the ground or at any other time or place to locate said last-mentioned claim in pursuance of any agreement with complainant to which these defendants were respectively *were* parties, and these defendants deny that the defendants Fagaly and Walker located said last-mentioned claim in the name of said Walker alone; and these defendants respectively, expressly disclaim and disavow any title or interest whatever in and to said Golden Era mining claim on the part of said Fagaly, and state the fact to be that the location of said claim was made by Walker individually and for his own benefit as they are advised, and these defendants have not sufficient information to form a
179 belief as to whether or not the complainant has or is entitled to any interest therein, but they deny that defendant Fagaly was or is in any manner interested or concerned in the said mining location as in said bill alleged.

Defendants are not sufficiently informed as to whether or not defendant Walker recognizes defendant Fagaly as having an interest in said Golden Era mining claim, but they expressly deny that the same was located in the name of said Walker by combination and agreement between the said Fagaly and Walker to defraud com-

plainant and their codefendants or any other person whomsoever alleged in said bill.

(Defendants are not sufficiently informed to form a belief as to whether or not defendant Walker gives out and claims that defendant Pilkey is interested in his proportion of said claim, nor as to whether or not defendants Leeds and Johnson recognize any interests of complainant in and to said claims, as alleged, and these defendants deny that defendant Fagaly has ever caused the said "North Star" and "Sunny South" mining claims to be relocated in the names of other persons for the purpose of defrauding complainant and his codefendants Leeds and Johnson and Julia Johnson or any other persons whomsoever out of any interest therein as alleged in said bill.)

Defendants further answering say they have been informed and believe it to be true that the defendants Mills and Dougine have jumped the said claims described as the "North Star" and "Sunny South" claims and have pretended to make a location of the same pretending and claiming that the ground- included therein are open to location, and that they are in possession of the said claims and refuse to permit the said original locators or complainant or
180 any other person claiming under said original location, including the complainant, to enter on the same for the purpose of doing work, sinking a shaft or doing any other work required by the statute of New Mexico in order to protect location of said claims, but these defendants expressly deny that the said pretended new location- of said claims were made by defendants Mills and Dougine in collusion with and at the instigation or procurement of these defendants or either of them and they deny that these defendants respectively have or claim any interest or benefit whatever in said pretended new location so made by said Mills and Dougine, and these defendants join with said complainant, and charge that said ground was not open to entry or location at the time said Mills and Dougine entered upon or attempted to locate the same.

Defendants further answering deny that at the time of filing said bill they were working and extracting and removing any ores from any of the claims described in said bill and deny that said complainant had any interest in said claims, but they believe that some of said claims contain valuable gold and silver ores and these defendants admit that defendant Fagaly was about to work said Washington mine at the time of the issuance of the injunction herein, as he lawfully might and may.

Defendants further answering say that it may be true for anything they know to the contrary that an interest in said mining claims respectively standing in the name of J. Johnson or J. A. Johnson belongs to or is intended to belong to the defendant Julia Johnson, but these defendants are utter strangers to any such matter, and can neither admit nor deny the same.

181 And these defendants show unto the court here that it appears by the said bill that the same is exhibited against these defendants, and the several other persons therein named as defendants thereto for distinct matters and causes in several whereof, as

appears by the said bill, these defendants respectively are not in any manner interested or concerned and that the bill is altogether multifarious and those defendants crave the same benefit of exception as if they had specially demurred thereto for the cause aforesaid.

And these defendants deny all and all manner of unlawful combination and confederacy wherewith they are by the said bill charged, without this that there is any other matter or thing in the complainant's said bill of complaint contained material or necessary for these defendants to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed and avoided and denied, is true to the knowledge or belief of these defendants respectively. All which matter- and things these defendants are ready and willing to aver, maintain and prove as this honorable court shall direct; and pray to be hence dismissed with their reasable costs and charges in this behalf most wrongfully sustained.

WARREN, FERGUSSON & BRUNNER,
Sol. for Defendants Fagaly and Pilkey.

H. B. Fergusson.

H. B. FERGUSSON, witness for the plaintiff, being sworn, testified as follows:

On direct examination he said:

Q. State your name and occupation.

A. H. B. Fergusson; attorney-at-law.

182 Q. Are you acquainted with the parties to this suit?

A. Yes, sir, I believe I am.

Q. Did you know one Frank Fagaly, defendant?

A. Yes, sir.

Q. Do you know about the date of his death?

A. No, sir, I do not exactly; it was some months prior to the death of Lee Walker which I remember was the 19th of August, 1895.

Q. Did you have in his lifetime any conversation with Frank Fagaly with reference to the mining property called the Sampson and afterwards called the Washington mine?

Counsel for defendant- objects to further answer to question than "yes" or "no."

A. Yes, sir, I had frequent conversations with him.

Q. Who was in possession or claimed to be in possession of the ground in controversy at the time of your conversation with Frank Fagaly?

COUNSEL FOR DEFENDANT-: "If you know?"

A. Fagaly and his associates.

COUNSEL FOR DEFENDANT-: That is what Fagaly told you?

A. Not entirely what Fagaly told me—I wasn't there and never saw Fagaly in possession.

Q. Who was claiming possession?

COUNSEL FOR DEFENDANT-: If the witness knows of his own knowledge.

A. Fagaly for one was certainly claiming possession within my knowledge. I never talked I believe with any other of the defendants as to whether they claimed possession—I did, yes, sir, with Lee Walker.

Q. Lee Walker, you state is dead also?

183 A. Yes, sir.

Q. State what declaration, if any, was made to you by the deceased, Frank Fagaly, in this conversation with reference to the interest retained by Charles Pilkey in the ground called afterwards the Washington mine in the Cochiti mining district?

Counsel for the defendant- objects upon the ground that it is wholly irrelevant, immaterial and incompetent to the issue in this suit, and upon the further ground that the declaration of Frank Fagaly, made at the time he understands them to have been made (after the consum-ation of any supposed conspiracy, as stated later on by counsel) could not in any way bind the defendants in this case at the present time; and also upon the ground that the testimony is wholly hearsay.

COUNSEL FOR PLAINTIFF: I might ask another question if counsel for defendant- desires to be heard, so that it can be heard all at the same time.

The COURT: I want as much embraced as possible if there is to be any extended argument.

COUNSEL FOR DEFENDANT-: I want to be heard at some length.

The court reserves its ruling at this time until he has heard from counsel on both sides, and at this stage of the proceedings the jury are withdrawn and the testimony of the witness is submitted to the court during their absence, the jury remaining out during the continuance of the examination of the witness, and are not recalled to the box until hereafter noted.

A. Yes, sir, he told me at various times that Pilkey was the owner of one of the fifths which stood in the name of Lee Walker.

Q. In what?

184 A. In the Washington mine.

Q. At what time did he say this interest of Pilkey attached or accrued?

COUNSEL FOR DEFENDANT-: Same objection.

A. From the time of the location and that it was arranged for beforehand; that is before the time of the location.

Q. What interest did Fagaly state he, himself, had in the location of the Washington mine in the name of himself, Walker, Johnson and Leeds?

COUNSEL FOR DEFENDANTS: Same objection.

A. One-fifth interest.

Q. What interest did he say the other locators under that location had?

A. He said that H. C. Leeds had one-fifth, Johnson one-fifth and himself one-fifth and Lee Walker held the other two-fifths in his name.

Q. What reason, if any, did he give for the interest held in the name of Lee Walker for the two-fifths and that of the other three being one-fifth?

COUNSEL FOR DEFENDANT-: Same objection.

A. He told me that it was fixed so as to avoid suspicion and for the protection of the parties making the location, as I understood him, from lawsuits and trouble—in substance; I am not undertaking to give his exact language.

COUNSEL FOR DEFENDANT-: I think you should state the conversation as near as you can recall it.

The COURT: I want it so it can be read to the jury, in case it is admitted, without going over it again.

A. I can give a connected story, if desired.

Q. I will ask the witness to state the substance of this conversation as he remembers it.

185 The COURT: Give the language as near as you can remember it.

Q. I will ask you at that time was there any pending litigation between these parties, and if so, what was the subject and nature of it?

A. A suit was pending between J. Q. Wills, one of these defendants, and Frank Fagaly, in which Wills claimed that Fagaly should convey him one-twentieth interest in the Washington of the four-twentieths which Fagaly owned. Upon the bringing of that suit, which is the same suit in which these affidavits have been read——

Q. You mean these bills and answer?

A. Yes, sir; Frank Fagaly employed our firm to defend his interests.

COUNSEL FOR DEFENDANT-: Who employed you?

A. Frank Fagaly.

COUNSEL FOR DEFENDANT-: As against what?

A. As against Wills in this claim for a twentieth interest by Wills.

Counsel for defendant- objects upon the ground that these communications were made to witness who was acting as attorney to Frank Fagaly at the time these communications were so made, and that the defendant Dunlop claims his interest through Frank Fagaly, and also that the record shows that in the same suit the answer was filed by Warren & Fergusson as attorneys for Charles Pilkey one of the defendants in this suit, and that the seal of professional privilege and confidence cannot be taken off without the consent of the parties interested.

A. While we were so employed and acting for Fagaly, Henry Lockhart came and for the first time stated the grounds on which he wanted a suit brought for the Sampson, claiming the
186 whole of the Washington claim substantially. He came to me with the suit first, I mean in person as one of the members of the firm. I told him at once we were representing Fagaly as to an interest under the Washington location, and that while in our opinion there was no real conflict in the two employments that it was so close a question that I thought we could not take his case, because his case proposed to attack the whole of the Washington title, the validity of it, though in the other suit it was assumed to be valid and the claim for ownership of one-twentieth under it. We had two or three conversations on the subject, and at a subsequent one to this first one I believe I made the suggestion to him that if he would put in my hands a deed for a fifth interest in the Sampson, conveying a one-fifth interest in the Sampson to Fagaly, that it would relieve the situation and enable us to take his suit. He objected at first. I told him that we could not take it any other way; that he might leave a deed with me so if Fagaly complained of any apparent inconsistency in our position I could show it to him, the deed to be delivered after the litigation was ended. Mr. Lockhart finally consented to do that and left the deed in my hands in escrow to be delivered at the end of the litigation, provided that Mr. Fagaly, inasmuch as he would be impartial as to the result of the litigation, would take the stand as a witness for the Sampson and tell all the facts connected with the location of the Washington claim.

Q. Were you ever employed on behalf of Fagaly in any litigation in which the validity of the Sampson location as against the Washington location was involved?

187 A. On the contrary we were against him as understood by him.

Q. Did you or not state these facts to him and what did he say as to consenting to make these statements to tell the truth?

A. I made no statement of the facts to him beforehand; we took the suit for Lockhart, filed first the bill which is the first bill filed in this court on the subject of the Sampson and Washington. As soon as the præcipe was served on Mr. Fagaly he came to me as I anticipated about it. I then explained to him this far: that we had anticipated there might be some apparent inconsistency and prevailed on Mr. Lockhart to put this deed in my hands which was to be delivered to him at the end of the litigation, and he thereupon expressed his satisfaction with the arrangement, and it was from that time understood that as to the Washington we were hostile to him as a defendant, but having it in our power to protect him by giving him at the end of the litigation this deed. I would like to state further about that: I never told Mr. Fagaly that he was expected, in order to make that deed deliverable, to testify, but I asked him to testify and called his attention to the fact that, being impartial now as to the result of the suit, that he ought to tell the whole thing—in substance.

Q. Were these declarations made to you in the course of your

professional employment by Fagaly in regard to any of the matters involved in this suit?

A. No, sir; on the contrary he made no declaration to me whatever until after this deed transaction was fully explained to him and he understood the situation.

Q. Were you ever employed on his behalf in the suit of Lockhart against himself and others?

188 A. No, sir; on the contrary he himself understood I was employed against any Washington interest that he had.

Q. Now you will please state what, if anything, he said as to a prearrangement between himself, Walker, and Pilkey, with reference to the possession of the ground in controversy in this suit, originally called the Sampson and subsequently by these defendants called the Washington?

COUNSEL FOR DEFENDANT: I object upon the same grounds already stated and ask leave to ask the witness some questions upon the ground of professional communications and the conditions upon which this deed was delivered.

THE COURT: Permission will be given you after the examination-in-chief before the court is concluded.

A. When I first asked him to tell me all the facts in the matter, as above stated, he said, "I do not like to do it; if I were a mind to," and I am giving his exact words now—"I do not like to do that"—as near as I can recollect—"If I were a mind to I could knock them out of the Washington claim entirely."

COUNSEL FOR DEFENDANT: That is, Fagaly said that?

A. Yes, sir. He had previously expressed his hostility to Wills, Johnson, and Leeds, saying in effect he had taken all of them in to the Washington; that they were now trying to rob him of a part of his interest. After saying "If I were a mind to I could knock them out of the Washington claim entirely," or words to that effect: that is as near as I can recall the exact words—he added, "I don't like to tell this thing, because if I am a gambler,"—he used exactly these words—"I have a good reputation in this town." I then told him I thought it was his duty to tell me after saying that much to me, but he went away that day, saying he wanted to think about it

189 more. Subsequently he came up and told me that he was ready to tell me all he knew about it and would take the stand and testify, and, in direct answer to the last question, he said that Walker came to him, certainly not earlier than September. He first said in the latter part of the summer of 1893. When I pressed him to fix the month he said it might have been in August but certainly was in September that Walker came to him in Albuquerque, Levy Walker, or Lee Walker, as he is indiscriminately called, and told him that Pilkey had something good in the Cochiti mountains; that Pilkey and he had long been friends—that is that Walker said to Fagaly as Fagaly reported it to me; that he, Walker, and Pilkey had long been friends and Pilkey, in prospecting for Lockhart and Ben. Johnson had found some valuable claims and that Pilkey was willing to fix one of them which he thought was

the best so that they could get it; or words to that effect; that he, Pilkey, wanted him, Walker, to go up with him and see what he had; that Walker said to him, Fagaly, after stating this, that he was not in good health and could not stand the fatigue or hardship and that he believed Pilkey would be willing to take Fagaly in with him provided he, Fagaly, would go and see about it, see what he had, whether it was worth fooling with, with a view of acquiring it. Fagaly said he then went up in the same month in September, early in September, inspected the claims and, especially what was known as the Sampson, being the one that Walker had referred to, as I understood, as being what Pilkey considered the best. I would like to state that these disclosures were in response to questions from me, myself—that he found the claim with a notice posted on it and some work done; that he examined the lead
190 and took a piece of rock selected by himself and Pilkey; brought it back to Albuquerque with him; had it assayed and got an assay of a little more—I do not remember the exact dollars, but I do remember it was a little in excess, as he reported to me, of $2.600 a ton. He said he immediately stirred around lively after getting that assay and took in; I do not remember whether he said he took them in then or not—that after getting the assay he made arrangements to go up and locate the claim. He told me that he made two trips to this mining claim, the Sampson, before the date that it would expire, which was the 10th day of October, 1893. The first one was a brief visit to get this ore; that the next one he went up with Pilkey about the 1st of October, or soon after the 1st of October, and went on the claim again with Pilkey and remained in Pilkey's camp until the 10th of October had expired, and that from the 10th of October until the 23rd of October Pilkey was paid $2.00 a day by the partnership or parties who were to locate this ground to take care of the claim for them.

Q. From what time?

A. From the 10th.

COURT: To the 23rd?

A. Yes, sir, until the Washington was located; that he, Fagaly, spent part of that time in the village of Cochiti waiting for the time to expire and he told me it was not located as soon as the day of October 10th passed because it would excite suspicion if it was located too soon afterwards; that the arrangement was made with Pilkey before the 10th of October, 1893, by which the claim was to be located in the name of four people, and that the ownership was to be one-fifth to H. C. Leeds as he stated, one-fifth to J.
191 Johnson, one-fifth to himself, Fagaly; the other two-fifths were to stand in Levy Walker's name, but one-fifth was to belong to Pilkey; that Pilkey agreed, in consideration of having a fifth, of not being called upon for development expenses for his share, and of this pay as laborer on claim at $2.00 a day, to allow the time within which the work on the Sampson claim was to be done, within which it was to be staked and the notice to be recorded, to expire without doing it. This he told me in substance and effect in various conversations.

Q. At the time was anything said as to the belief on the part of Pilkey and Fagaly, Walker and others as to this being upon public land and subject to mining location?

COUNSEL FOR DEFENDANT: "Same objection."

A. That was assumed; I do not know that he said that in so many words.

Q. Can you fix the date of these conversations approximately?

A. Yes, sir, I think I can. The suit I believe was filed——

The COURT: What suit?

A. The first suit we brought for Lockhart after he employed us to contend for the Sampson location; in May, 1894, I think.

The COURT: The papers in the case will show. You can state when with reference to that date, when it was.

A. These conversations began with reference to these disclosures he made in regard to the Washington claim——

COUNSEL FOR PLAINTIFF: It is a fact as shown by the bill that the first equity suit was filed May 26th, 1894.

192 A. The first of these conversations occurred subsequent to the filing of that suit and they extended substantially up to the time of his death in various conversations. He told me once, after he had made most of the disclosures, that I could buy a fifth interest; this was on the street at Frank Sturgess' corner; I was passing there and he stopped me and said if I wanted to he could get me a fifth interest in the Washington location for $1,000.00.

COUNSEL FOR DEFENDANT: Whose fifth interest?

A. I asked him that question, whose fifth interest it would be; he said Pilkey's; that Pilkey was in debt and was bound to sell out——

COUNSEL FOR DEFENDANT: I make a separate objection to that upon the ground that Pilkey wasn't there.

A. And that he was satisfied I could buy it for $1,000.

The COURT: It looks to me that ought to be out.

COUNSEL FOR PLAINTIFF: We think it admissible upon the general principle that where there is a *prima facie* case of conspiracy or confederacy shown between parties to perpetrate a fraud that the statements and declarations of one of the confederates in respect to him *is* admissible in evidence not only as against him but as evidence to go to the jury upon the question of fact as against all of the confederates.

COUNSEL FOR DEFENDANT: We submit it would be immaterial, even if the witness was entirely unconnected with the transaction as an attorney, irrespective of privileged communications.

The COURT: I say now that it does not appear to me to be competent however I may decide the other question.

A. He told me afterwards when he sold it—shall I go on in that line?

The COURT: Yes.

193 A. He told me Pilkey was in debt and was bound to sell, and I told him I was not in a position to buy; that it would not be right for me to buy in the first place, and a day or two afterwards I met him in about the same place and accosted him and asked him if Pilkey had sold his interest, or if it was for sale yet, and he said then "Yes, I think he sold all or part of it to A. B. Putney."

Q. About what date was that?

A. I do not remember the date except it must have been about the time of any sale to Putney——

COUNSEL FOR DEFENDANT: "Same objection."

Q. Was anything said in that conversation as to who had executed and conveyance to Putney for this Pilkey interest?

A. No, sir; that was assumed between us because we had fully talked between us as to how that stood.

Q. Do you remember about the date he said that this assay of $2,600 had been obtained by him?

A. In the month of September; he said he could be positive it was September and I tried to get him to fix the exact date but he would not do it; said he could not.

Q. Who did he say were parties to this agreement with reference to obtaining possession of the claim?

A. At first it was himself, Walker and Pilkey, as I understood; that Pilkey was in Albuquerque some time in September, he told me that, and that the first arrangement was between himself, Walker and Pilkey; that subsequently Johnson and Leeds were taken into the scheme because they wanted the expense shared and supposed that these men would be able to do that. He told me
194 in response to a direct question on that subject that Leeds and Johnson and Wills were all fully informed at that time of the location of the Washington October 23rd; that they got a fifth each because Pilkey had to be taken care of.

COUNSEL FOR DEFENDANT-: I object for the same reasons.

The COURT: You mean the general reasons stated and the additional reason about the parties not being present?

COUNSEL FOR DEFENDANT-: Yes, sir.

Q. What was the object of the agreement as between these parties you have named?

COUNSEL FOR DEFENDANT-: Let the witness state what was said and not ask for his opinion or conclusion.

Q. What was said by him as to the object in view by these persons?

A. Well, he told me it was located in that way and Pilkey's name kept out of it for protection. I remember noticing that peculiar word. The general effect of what he said was they did not want to arouse suspicion by letting Pilkey's name appear.

Q. Protection against whom or what?

A. He did not say.

Q. What did he say as to who was in possession claiming this Sampson mine at the time this agreement was entered into between the parties?

A. Pilkey.

Q. For whom and under what?

A. Under this contract with Johnson and Lockhart, as I understood him.

Q. I think you said he said when he went up in September this notice was posted in the name of Lockhart, Ben. Johnson, and Pilkey in the claim?

A. Yes, sir; and he told me it was as late as December he
195 saw J. Q. Wills take that notice down and take it away; that Wills was remonstrated with at the time that it was contrary to law to remove the notice of a mining claim, but that he took it away and saw him fold it up and put it in his pocket and take it away; I think he said that was in September when Wills was up there.

Q. That was the Sampson location?

Q. Yes, sir.

Note by stenographer.—In the previous answer before the last one the word "December" on the top line of page should no doubt be September in the latter part of the answer, or *vice versa*. The witness may have made the mistake accidentally or I may have misunderstood him, but as my shorthand notes are plain I do not feel at liberty to make the correction.

Q. Is there anything else?

A. I do not think of anything else. I would like to state I have given in substance and effect what I elicited from Fagaly by questions after he expressed a willingness to tell me all about it.

Q. Well, you didn't fix definitely the date of the conversations; you said it was whilst Fagaly, Walker, J. A. Johnson and Leeds were still claiming possession under the Washington claim?

A. Yes, sir; they were all prior to the time of the Fagaly deed to Dunlop; they were certainly within the dates of the filing of this suit in May, 1894, and the deed of the Fagaly interest in the Washington to Samuel Dunlap.

The COURT: When was that?

A. I do not remember the date, but when the deed was made those two men called on me and demanded this deed to the Sampson interest which Fagaly had undertaken to sell to Dunlop
196 at the time he sold his interest in the Washington.

On cross-examination he said:

Q. You refused to give him that deed?

A. Yes, sir.

Q. That was the deed which Lockhart executed to Fagaly and which was deposited with you to be held until the suit between Lockhart and these defendants here—the litigation between Lockhart and these defendants here—had been finally terminated?

A. Yes, sir.

Q. That was your understanding of the conditions upon which it was to be delivered?

A. Yes, sir; it was left in my hands and not to be delivered until the litigation was ended, and Lockhart told me I might deliver it provided Fagaly had opened up and told this whole thing in which he believed he had been wronged and wanted unearthed.

Q. Who was to be the judge whether Fagaly told this whole thing or not?

A. Nothing was said about that.

Q. Suppose Fagaly refused on the witness stand to tell those things he told you, what became of that deed?

A. I would have given it back to Lockhart.

Q. Then the condition of the delivery of that deed was that Fagaly should take the witness stand and testify in substance to the facts you have stated here?

A. No; Fagaly never had any understanding as to his testimony at all, and the arrangement from Lockhart to me, or his directions, were not that he should testify to any given facts that either I or Lockhart knew then, but that he should tell the whole truth of the location of the Washington claim.

197 Q. What did you consider to be the truth, or would have considered the truth—the facts you have given in substance as evidence here, or suppose he had deviated from those facts would you have still considered them to be true?

A. I believe I would from the manner he displayed in talking to me at the time. When he first began he expressed shame as to what he had done and a disinclination to tell it for that reason and seemed to be affected almost to tears in telling it and showed a decided sensibility about it.

Q. Who was to be the judge whether that deed was to be delivered?

A. I suppose I would be the judge since Lockhart had no talk with any of the firm except myself.

Q. You had a good deal more interest in the success of the litigation in favor of Lockhart than that of Fagaly with Wills?

A. I do not know that I had. Do you mean to imply that I acted dishonestly with Fagaly and Wills?

Q. I do not mean to imply anything.

A. The question seems to imply that; I leave it to the court.

The COURT: These questions the counsel for defendant would have a right to ask you before the jury.

A. I would like to add in addition to the answer that the employment by Lockhart was very much more lucrative to the firm; in that way there was more interest. The Fagaly litigation with Wills had fallen in my absence into the hands of Judge Warren and Mr. Brunner my partners at the time and I never took any part in that personally, whilst in the Sampson litigation Mr. Lockhart had come to me first by accident, business falling in our

198 firm sometimes in the hands of one and sometimes in another partner more particularly, and I have been active

in Mr. Lockhart's case from the very first; but it is not true that we did not serve Fagaly with perfect fidelity in his suit against Wills so far as I know.

Q. There was a one-twentieth of the Washington location in controversy between Wills and Fagaly; that was all that was controverted in that case?

A. Yes, sir; that is my understanding of it.

Q. In the other case if Lockhart succeeded, if you delivered the deed to Fagaly, that fifth interest to Fagaly, Fagaly would be secure against Lockhart and against the one-twentieth that Wills claimed?

A. Yes, sir, as I understand it.

Q. And the other four-fifths in Lockhart's interest would be obtained by Lockhart if he succeeded in the litigation?

A. Yes, sir.

Q. You talked with Fagaly about his suit against Wills prior to the retention of your firm by Lockhart in this litigation?

A. I do not think I ever spoke to him about it. Mr. Bruner and Judge Warren had that case well under way on my return from some absence as I remember.

Counsel asks for and is handed bill in said suit.

Q. Did you have any conversation with Fagaly, to which you allude here, prior to the fifth day of February, 1894?

A. I think not.

Q. All of your conversations were after that time?

A. Yes, sir; and after the time Lockhart's suit was filed, the first one in chancery.

Q. What time was that filed?

199 A. 26th of May, 1894.

Q. And it was after the Lockhart suit was filed?

A. Yes, sir.

Q. Then you had no conversation with Fagaly affecting his interests until after the suit in the name of Lockhart had been brought by your firm?

A. No, sir.

Q. Did you prepare the suit of Lockhart against these defendants?

A. No, sir.

Q. Who did, your partners?

A. Judge Warren prepared that.

Q. You knew that both suits were pending?

A. Yes, sir.

Q. It was after both suits were pending, and Fagaly being a defendant in Lockhart's case, that you had these conversations with Fagaly?

A. Yes, sir.

Q. What was the date of that deed from Lockhart to Fagaly?

A. I do not remember, some time, though, prior to the 26th of May, 1894.

Q. Before the suit was brought?

A. Yes, sir, or about the time it was brought, I would not say positively.

Q. Have you got that deed here?

A. No, sir.

Q. I believe you were served with a notice to produce it?

A. It is in my hands now in escrow.

Said deed is produced and handed to counsel for defendant.

Q. I see that this deed is dated the 30th day of March, 1894; the deed then was delivered to you prior to the beginning of the Lockhart suit?

200 A. Yes, sir; if that is the date; I think it was delivered to me the day it was dated.

Q. You must have had some understanding with Fagaly about that?

A. No, it was not delivered to me at that time; it was acknowledged on the 25th of May, 1894.

Q. The day before this suit was brought?

A. Yes, sir; my recollection is this deed was given to us before I filed the suit; the date bears that out.

Q. Now, under what conditions were you to deliver that deed to Mr. Fagaly; state exactly what the understanding was?

A. Well, first it was to be delivered, as to time, when the litigation between Lockhart and these defendants in this suit was finally concluded to whatever court it might go. Those words were not used, but that is my understanding of the terms.

The COURT: You mean successfully concluded?

A. Yes, sir; otherwise there would be no use to deliver it.

Q. If not successfully concluded, not otherwise to be delivered?

A. It would not be worth much if not successfully concluded. In the second place Mr. Lockhart told me he was willing for me to deliver it. I might deliver it provided Fagaly had in the litigation told all that he had some reason to believe were the inside facts as to the manner the arrangement was alleged.

Q. In other words, if Fagaly testified the way you and Mr. Lockhart thought the facts to be you might deliver the deed; otherwise not?

A. There was no talk between Lockhart and me as to what we expected Fagaly would tell, except in a general way Mr.

201 Lockhart expressed a conviction that he had been swindled and robbed and believed if Fagaly would open up we would win the suit.

Q. The understanding was when you were talking to Fagaly you were Fagaly's attorney; Fagaly so understood?

A. We were as a matter of fact, and I guess he understood it, and I did too—Fagaly's attorney in the litigation as to the twentieth ownership under the Washington location, the twentieth interest.

Q. Did Fagaly ever authorize you to testify as to the statements he made to you under any circumstances?

A. No, sir; Mr. Fagaly died suddenly, unexpectedly to me, and

up to the time I heard he was dead I had no doubt he would take the stand and tell this himself, so I could not anticipate telling it.

Q. It was never expected you would testify to it, but you expected Fagaly would testify to it if he had lived?

A. Yes, sir.

Q. Then I would like to ask you, did Fagaly come to you before his death in company with Samuel Dunlap and demand that deed?

A. Yes, sir—no he didn't come and demand the delivery of the deed; that is, Fagaly came in company with Dunlap and stated to me he had sold his interest in the Washington and Sampson to Mr. Dunlap, that he had made him a deed to his interest in the Washington and that he wanted the deed which I held to be delivered to him in the future, delivered, when it was delivered, to Mr. Dunlap; that was the request.

Q. Was there any contemplation or understanding as to what should be done with that deed in case Fagaly died?

202 A. No, sir.

Q. Why is not that deed subject to delivery after Fagaly's death as you understand the matter to Dunlap?

Counsel for plaintiff objects to question as calling for the legal opinion or conclusion of the witness which the court would have to draw.

COUNSEL FOR DEFENDANT: "I ask the question in order to base my argument to the court?"

A. Well, in the first place the deed was to be delivered when this litigation was successfully terminated in behalf of Lockhart; in the second place it was to be delivered in case Fagaly took the stand and testified in person to what he told me were the facts. He never did so take the stand and testify, and I presume that is a sufficient answer to the question; and when he died I will state—(interrupted by next question by the court).

The COURT: Let me ask you this: As I understand you, Mr. Lockhart delivered you this deed to be delivered to Fagaly, not if he stated the facts on the stand he had related to you, but if he opened up the matter?

A. Yes, sir.

The COURT: Because no revelations had been made by Fagaly to you at the time Lockhart gave you that deed?

A. No, sir; nor for several weeks afterwards.

Q. You hadn't talked to Fagaly when Lockhart gave you this deed?

A. No, sir; Fagaly didn't know I had this deed for some weeks afterwards.

Q. Did you tell him you had the deed when you had your talk with him when he told you these facts?

203 A. Yes, sir; I told him I had the deed soon after the suit was brought, because he came and asked me about bringing the suit against him in the Sampson-Washington case, the present suit.

Q. He understood you were about to bring a suit against him on that account?

A. He understood we had brought it because the subpœna had been served on him.

Q. And then you told him you had that deed?

A. Yes, sir; that I hadn't brought it until I could protect him.

Q. You told him you would deliver the deed if he told the facts?

A. I believe he had already said he expected to open up and tell all; that was simply an afterthought that I let him know the deed was there and know he was in an impartial position.

Q. Look at that affidavit; is that your affidavit?

A. Yes, sir.

Q. Does not that state that the deed was placed in your hands, of affiant, in esc-ow, to be delivered by you to Fagaly upon and on the promise of the performance of certain conditions by said Fagaly; now what conditions?

A. Is the word promise there?

Q. Yes, sir.

A. It ought not to be if it is—(witness looks at said affidavit). Well, that ought not to be in there if it reads that way. That is all I have to say about that. It is a fact that in my own mind I determined not to tell Mr. Fagaly and to do no more towards inducing him to testify than to show him that he was in an impartial position by showing him the deed, and I never did tell him that the deed was to be delivered on his testifying to anything.

204 Q. You say then when you made that affidavit you made a mistake in putting that word promise there?

A. It is a mistake.

Q. Then you should not have put that word "promise" there?

A. It is a mistake; if it implies that I had told Fagaly before he made these disclosures to me he was to do so before he got his deed, then it is clearly and unequivocally a mistake.

Q. You got, Mr. Fergusson, a deed to a fifth interest of the two extensions, north and south extensions, of the Washington?

(No answer to this question, the court interposing a question to witness about the same time and diverting the attention of the witness to his question.)

The COURT: What conditions, if at all, Fagaly was to perform?

A. There was no condition named to him he was to perform.

Judge WARREN (counsel for plaintiff): Except in regard to the conclusion of the litigation?

A. The litigation was expected to be concluded—yes, he was told this deed was to be delivered to him when the litigation was over, nothing more.

Q. Didn't you get a deed from Fagaly to his fifth interest in the North Star and Sunny South as your fee for representing him in this litigation?

Objection by counsel for plaintiff, but witness answers at same time.

A. No, sir; I will state in connection with that that Mr. Fagaly had a money consideration to pay in his Wills matter, and after paying a part of it I think there was a balance of $100.00—either $50.00 or $100.00 due for the fee in the litigation between
205 Wills and Fagaly about the 20th interest, and that I bought the fifth interest first, personally, from Fagaly for the balance of this fee and I think $100.00 which I paid him in cash. Subsequently, at Judge Warren's suggestion, I deeded him half of what I had obtained from Fagaly in the North Star and Sunny South—the north and south extensions of the Washington.

Q. That litigation between Dunlap, as successor of Fagaly, and Wills is still going on?

A. Yes, sir.

Q. Do you know in whose handwriting the name of Warren, Fergusson & Bruner to that answer is in?

A. I think Mr. Bruner's.

Q. Your firm filed an answer for Charles T. Pilkey as well as for Fagaly?

A. It seems so.

Q. You were also attorneys for Pilkey in that litigation?

A. Yes, sir.

Q. And the Lockhart litigation would have sufficed to have defeated Pilkey completely so far as any claim in the Washington mine was concerned, would it not?

A. I do not know how Mr. Pilkey employed the firm, but my understanding was we represented Fagaly and that Pilkey joined in this at Fagaly's request. Pilkey never employed us in the sense of paying us anything.

Q. Did you ever notify Pilkey you were not representing him in that case?

A. No, sir; not that I know of.

Q. That is signed by Pilkey (referring to paper shown witness) and sworn to by Bruner who was in the office of Warren, Fergusson & Bruner?

206 A. Yes, sir—my understanding is that Mr. Fagaly had Pilkey join him in this because Pilkey and Fagaly were standing together in the fight of Wills, complainant, and that he had Pilkey join him in this and we were only nominal attorneys of Pilkey, Pilkey never employing us in the sense of paying us a cent, and what we did was only done as I understood it as part of our fight for Fagaly at Fagaly's and Pilkey's request.

Q. You say Pilkey was standing in with Fagaly in that fight?

A. Yes, sir, they were.

Q. If that statement of Fagaly to you was true in fact and law Pilkey would not stand much show in it would he—if that statement was accredited in fact and law Pilkey would not stand much show in that mine?

A. I do not know. I know that the Wills-Fagaly fight was on several months before Lockhart or the Sampson fight came up, and that in filing this answer for Fagaly as against Wills Pilkey never in my knowledge employed the firm or paid a cent and he was

nominally put in at Fagaly's request, with his consent, by arrangement between him and Fagaly because he was helping Fagaly as against Wills as I understood it.

Q. As a matter of fact your firm entered an appearance for Pilkey as well as Fagaly and stand on record as his attorney now?

A. Yes, sir, we filed that answer.

Q. Did you ever have any conversation with Mr. Pilkey about representing him against Mr. Lockhart?

A. No, sir.

Q. At no time?

207 A. Never; not that I remember of. I do not think I ever spoke to Mr. Pilkey about this case in my life; I do not remember it now if I ever did.

COUNSEL FOR PLAINTIFF: It is admitted that Warren, Fergusson & Bruner appear upon the record as attorneys for Pilkey.

COUNSEL FOR DEFENDANT: The answer will show that but I want the evidence in the record as to when they entered their appearance here.

Q. Do you know who drew that answer up, who it was actually drawn up by, which member of the firm?

A. I do not know, sir; my understanding of this is, as I have already explained, that it was at Fagaly's and Pilkey's request—simply a voluntary appearance as attorneys because Pilkey was on Fagaly's side in this contest with Wills; I think Pilkey always understood we never acted for him.

On redirect examination he said:

Q. Was any relief asked against Pilkey at all in that bill?

A. I think not; I do not know sir; Judge Warren prepared this Pilkey-Fagaly suit.

On recross-examination he said:

Q. He is made a defendant in this case; there could not be an answer for him unless he was a defendant?

A. I do not know whether it shows he had no interest in it or not.

208 Q. You read it to the jury that he did have an interest in it?

(No reply to this last question.)

On re-examination by counsel for plaintiff:

Q. You state that you had no personal connection with this suit of Wills against Fagaly and others?

A. No, I did not prepare the pleadings. I found them prepared when I returned from some absence.

Q. Is it not a fact that in that bill it was claimed on behalf of Wills, the complainant, that he was entitled as against these four defendants, Fagaly, Walker, Leeds and Pilkey, to one-fourth of their respective fifth interest in the Washington location?

A. Not Walker; my understanding is that Wills in that bil

claims one-twentieth of the mine standing in Johnson's name, one-twentieth in Leeds' and one-twentieth in Fagaly's name; so it would make those three owners of nine-twentieths between them or three-twentieths each and that Pilkey had no interest in the suit. I think now that I talked personally once with Fagaly and Pilkey and that Pilkey stated at that time he had no interest at all in it and none was claimed as against him.

Q. Precisely.

A. I knew I had the impression from somewhere—and now I can state I got it from Pilkey and Fagaly—that we filed that answer for Pilkey in a formal way and he told us no interest was claimed off him by Wills.

Q. I will call your attention to this allegation in Wills' bill:

"That the said Hub C. Leeds, for and on his behalf agreed with the said defendants, that of the one-fifth interest in any claims
209 located which should belong to him, the said defendant Leeds and his codefendants, Fagaly and Johnson, he the said complainant should have an undivided one-twentieth interest in said claims; that is to say, that out of the undivided one-fifth interest in said claim which under said original agreement should and would belong to the said three defendants, Leeds, Johnson and Fagaly, one-twentieth each should be set apart for the said complainant, making the interest of said complainant and said three defendants in said claims so located each an undivided three-twentieths, and that the said defendants Pilkey and Walker should have their original one-fifth interest each in said claims."

A. Yes, sir, upon reflection, I hadn't thought of that before.

Q. So that it appears in the suit of Wills against Fagaly and others that Pilkey—that as to Pilkey and Walker, there was no relief asked by the complainant?

A. Yes, sir.

Q. And the interest of Fagaly in that suit was in resisting the claim of complainant Wills to an undivided one-twentieth in Fagaly's interest in the Washington location?

A. Yes, sir.

Counsel for defendant objects because the papers speak for themselves.

A. I will state further that I remember Mr. Fagaly and Mr. Pilkey coming to the office and that it was stated by Mr. Pilkey that he had no interest in that suit; and if we appear to have filed his answer it was in a formal way at Fagaly's request as part of his case and resistance to Wills' demand.

210 Q. Now, at the time of these disclosures were you or not, or was the firm of which you were a member, or not, in any manner employed in respect to an interest of Fagaly or Pilkey as against the Sampson location?

A. In no manner whatever and never have been.

This concludes the witness H. B. Fergusson's testimony before the court while the jury were withdrawn.

Counsel for Plaintiff: We submit these disclosures or declara-

tions of Fagaly which have been testified to by the witness are competent upon the ground of declarations in this suit as between the Sampson location and the Washington; that they are competent so far as Fagaly is concerned as declarations against interest, against his interest in the Washington location; that they are admissible further as proof of a confederacy or conspiracy between himself and these other parties to defraud Lockhart the plaintiff in this suit of his interest in the Sampson location.

COUNSEL FOR DEFENDANT: Besides the grounds of objection already stated we further object upon the ground that the testimony is inadmissible and should be excluded as against public policy.

Adjournment until 7.30 p. m., Feb. 13th, 1896, which is consumed in argument and citation of authorities by counsel pro and con as to admissibility of the testimony.

FRIDAY, *Feb. 14th*, 1896—9.30 a. m.

Jury still out.

THE COURT: "In this question the only one before the
211 court now to be passed upon is as to the admissibility of the evidence of the witness Fergusson. I will state that the questions adverted to by the wide range of the arguments presented even as to that alone—I do not know whether I can pass on it or not, but I think the testimony inadmissible for several reasons. One is, it appears to me that whatever conspiracy or confederation or combination there was, it was ended at the time or taking of possession, and there is nothing in the testimony anywhere that indicates that the status of these defendants, as far as this suit is concerned, or so far as any purpose they had to accomplish was concerned, was any different in March, 1894, or May, 1894, or afterwards, than it was in October, 1893. The evident purpose was to secure title, at least a right to work a mining claim there under the laws of the United States, and that was to be secured by location in a certain way. Well, all that could be accomplished in that way was accomplished on October 23rd; therefore the conspiracy was ended, and these declarations or disclosures made in May, 1894, are not competent to prove anything as to that; and then the other question, as to its being against interest. I do not think it is against interest as a matter of fact if this party Fagaly was to be put in such a position whether the Sampson won or did not win—or would be in at least as good a position if the Sampson won and he would not be in as good a position if Wills won; so it seems it was a case in which the declaration was in his interest or not against his interest. And as to the other question, as to whether or not it was under the seal of professional confidence. I think every intendment ought to be in favor of excluding communications made to one in the capacity of
212 an attorney if the matter communicated can in any way be supposed to refer to the case in which a party is counsel. If you fritter away that rule you will soon reduce it to a place where one will always be doubtful about communicating matters to

attorneys employed as counsel and if there is any rule that ought to be certain, fixed and definite, and every intendment in its favor, it should be that of secrecy between counsel and client; and I asked counsel yesterday in the course of his argument if when that communication had been made, and inferentially he was given to reveal it, if it were not revokable, and the reply was that at least death having intervened that it was not pertinent; but it seems to me the fact appears from the testimony it was revokable. Mr. Fergusson was still counsel for Fagaly when Fagaly transferred his interest to Dunlap, Dunlap receiving whatever interest Fagaly had, and Fagaly wrote or went to Mr. Fergusson and asked for the deed. If it was an honest transaction on the part of Fagaly, and the presumption is to be that way if it can be indulged, then Fagaly would not be willing that Dunlap should take title subject to be defeated by any revelation Fergusson might make, and it seems to me the inference should be drawn that whatever he said to him was under the seal of secrecy and unrevoked, or any permission he may have given him to reveal it was revoked. I therefore hold that the testimony of Mr. Fergusson cannot be submitted to the jury.

COUNSEL FOR PLAINTIFF: To which ruling of the court we except, that the declarations have been made after the alleged consummation of the purpose of this conspiracy. I trust your honor will permit us to be heard in reference to that matter before finally passing upon that question.

213 THE COURT: At least the last ground, if tenable, would exclude the testimony entirely, and I say I would exclude it upon the last ground entirely as privileged communications.

COUNSEL FOR PLAINTIFF: Would your honor have any objection to stating—(interrupted by the court).

THE COURT: I only adverted to these others because it had been gone over in the arguments and I thought it would be an indication of like testimony to be offered.

Counsel for plaintiff excepts to the ruling of the court.

The jury are now returned to the box at the commencement of the testimony of John S. Neeland.

JOHN S. NEELAND, witness for plaintiff, being sworn, testified as follows:

On direct examination he said:

Q. State your name and occupation.
A. My name is John S. Neeland.
Q. Were you acquainted with Frank Fagaly in his lifetime?
A. Yes, sir.
Q. Were you acquainted with Levy Walker in his lifetime?
A. Yes, sir.
Q. Did you know them in 1893?
A. I did.
Q. What was their occupation?
A. They were both sporting men.

Q. Gamblers do you mean?

A. Yes, sir.

Q. What relation or connection did you have in any way with them, if any, in their lifetime?

214 Counsel for defendants objects. Question stated to be preliminary.

A. With Mr. Fagaly?

Q. And Walker.

A. In August and September me and Frank Fagaly was interested in a faro bank, that is I put in half of the bank roll and he ran the faro bank.

Q. Did you have any conversation with Frank Fagaly prior to October 23rd, 1893, with reference to a mining claim then known as the Sampson in the Cochiti mining district?

A. I did.

Q. At that time did you know who was in possession of and claiming the Sampson mine (COUNSEL FOR DEFENDANT: "Of your own knowledge") at that time, or from a statement of Fagaly?

Objection by counsel for defendants, and the court rules that the proper foundation has not yet been laid for a statement from Fagaly to witness.

Q. How did you have knowledge?

A. Only through Fagaly.

Q. What, if anything, did Fagaly say with reference to the purpose of himself in connection with others to obtained the possession of that mine called the Sampson?

At this point in the examination of the witness the jury retired under the direction of the court and the witness continues giving his testimony while they are absent, the court reserving his ruling upon the objection of counsel for defendants until he hears the evidence which counsel for plaintiff and counsel for defendants
215 differ upon as to its admissibility in the presence of the jury.

A. Do you want me to tell how the occurrence came up how I first got connection with the mine?

The COURT: Just answer that question.

A. Why, he said they were expecting to have trouble over the possession of it.

Q. At what time did you talk with him?

A. Along about the fore part of September Fagaly stated to me——

Q. 1893?

A. Yes, sir he said; "Let's close up the faro bank." I said "What for?" He said "I think we have something we can make a little money out of." I said "What is it?" He said "I was talking with Fagaly and Pilkey last night."

Q. Charles Pilkey and Levy Walker?

A. Yes, sir. He said "Pilkey seems to think he has found something pretty good up the country and it will be well to look into it." I said "All right, I will put in my portion of it and if there is

anything in it I am in for it," and I asked him where it was and he said he could not hardly tell me, that things were in such a shape he could not hardly tell me, that you had to go to Wallace and go 40 miles on horseback, and he said, "When I get back I will tell you about it if there is anything in it, if there is not it is no matter." That is all the conversation we had at that time and he left.

Q. Did you know from his statement where he went, and when did he return?

A. He was gone probably 5 or 6 days, probably, I do not remember now.

Q. Did you have any conversation with him upon his return?

216 A. When he returned he didn't say anything to me until it ran along several days, and the first thing I knew I heard about Fagaly and Johnson and Leeds making a rich strike. I say "I think it *iout bsa i:bk* making a rich strike. I say "I think it is about time I found out something about it." I said to Fagaly, "Where do I get onto it." He says, "John, the thing is going to be mixed up so badly I thought it advisable not to take you in; Leeds and Johnson were better able to keep it up and you don't say anything about it and I will see you protected." That is all the conversation I had at that time.

Q. What time was that?

A. That must have been going along towards the last of September. This was after he had been up there and came back.

Q. Did he or not tell you anything about having obtained an assay of mineral from the property?

A. No, sir; he didn't tell me; I heard that as a rumor, that he had a large assay.

Q. Did you hear it from Levy Walker or from any of the other parties here?

A. I do not remember that I did; I do not know.

Q. You simply heard it as a rumor?

A. Yes, sir.

Q. Did you have any further conversation with Fagaly?

A. Yes, sir, some time afterwards, I don't remember what time, it was when they brought a car-load of ore out at Wallace, he came to me and said, "John, we have a car-load of ore on the track; I am pretty short of money, I think we will get plenty of money out of it and if you will lend me $100.00 I will give it back;" and when I let him have the $100.00 the ore didn't pan out, there

217 was no show to get anything out of that, and he paid me the $100.00 back.

Q. Did you have any talk with Levy Walker with reference to this property?

A. Yes, sir.

Q. At what time and what was it?

A. It was some time after Fagaly had been up there, probably a month or six weeks.

Q. The first time?

A. Yes, sir. Lee Walker came to me and he said that he was short of money and he wanted to borrow a hundred dollars from me to keep up his part of the work on the Washington mine. I told him, I says, "Lee, don't you have any knowledge how I am mixed up in that?" He says, "Yes, I have heard something about that and I am sorry Fagaly did not do better by you than he did." He says, "I will see, if it turns out anything you will be all right," and I loaned him the $100.00.

Q. Was that all the conversation with Walker?

A. I had several conversations with him. He was up at my house.

Q. What, if anything, did he say as to any interest of Pilkey in the property?

A. He told me a number of times Pilkey was insisting on him deeding over his interest to Pilkey in the name of his wife. He said he was almost afraid to do it; at the same time he wasn't going to be in a rush anyway to do it, that he was feeling kind of sore himself.

Q. That Pilkey was insisting upon his making a deed of what interest?

A. I do not know.

Q. The amount of interest he did not mention?

A. I never asked him and he didn't tell me; I do not know what interest Walker had.

218 Q. Did he say why he was afraid to do it?

A. On account of—it was bad; it showed up bad; he was afraid to do it.

Q. How?

A. On account of the claim.

Q. Did he say with whom?

A. Of course, he said it was all understood between Lockhart and Johnson where the trouble was.

Q. That his making a deed to Pilkey would show up bad?

A. Yes, sir.

Q. Is that all you know with reference to it?

A. All to speak of, except the last conversation I had with Walker when Heacock was in the saloon; we had a little conversation about it. Mr. Heacock was in the saloon and he was saying something about the Washington mine, how rich it was, and I said, "You know if Lockhart and Johnson had their just dues they would own the mine," and then Heacock went off and Lee Walker just then came back and he said, "What did Heacock say to you or what was it you said to him?" I told him just what I told him, he says, "You don't mean to do me any harm?" I said, "No, I don't," I says, "You know how I feel;" he says, "You keep still and as soon as I can dispose of this interest of Pilkey in the mine I will fix it for you;" I said, "I don't expect anything from you, Fagaly is the man I am looking to."

Q. Did you have any further conversation with him?

A. I seen him before he died a couple of days, but did not have any conversation with him.

Q. This conversation you have first mentioned with Fagaly occurred as I understand you in September, this conversatioa with reference to obtaining it?

219 A. Yes, sir, with reference to my being interested with him; we closed up the faro bank some time about the fore part of September for him to go up there.

Q. How long was he absent on that occasion?

A. Five or six days maybe, I do not remember.

Q. Do you know when he next went up there?

A. No, I do not know, probably the first of August maybe—October I mean, I expect; I do not remember now when he did go back.

Q. Do you know who accompanied him up there?

A. No, sir, I do not.

Q. Did you see Pilkey here about that time?

A. I seen him off and on once in a while.

Q. About the first of October, about the time Fagaly went up the second time to the mine?

A. I could not say that I did see him.

Q. Did you see Pilkey in town that you remember of, that is in Albuquerque?

A. I could not say whether I did or not.

On cross-examination he said:

Q. You say this first conversation occurred with Fagaly in September, early in September?

A. I believe some time in the fore part of September.

Q. You closed up the faro bank, I understood you to say, now state exactly what Fagaly said to you.

A. He came down one day and says, "John, we had better close up the faro bank," I said, "What is the matter?" he said, "I have been talking with Walker and Pilkey and Pilkey seems to think he has found something pretty rich up the country and it is

220 advisable for me to look into it;" he asked me if I was willing to go into it and I said I was willing to go into anything with prospects of making anything out of it, and we closed up the faro bank and divided up the bank roll.

Q. That was all that was said on that occasion?

A. Of course I asked him how it was and he told me as much as he dared to.

Q. What did he tell you?

A. I asked him where he was going and he said he would have to go to Wallace and about forty miles on horseback to it, but said he could not very well say much about it until he got back and it was liable to be trouble about it, and when he got back if he found anything he would tell me, and if not there was no use talking about it.

Q. Are you positive he said at that time there was liable to be trouble about it?

A. Yes, sir.

Q. That was all that was said on that occasion?

A. Yes, sir; I believe that is all that was said.

Q. When did you next have a conversation with Fagaly?

A. When he came back afterwards.

Q. How long afterwards?

A. I should judge very likely two weeks.

Q. What did he say in that conversation?

A. That was the time I asked him where my interest came in; I had heard they had found something and it was about time I found out where I came in, and he told me the reason he had not taken me in.

Q. Was that in October or September you had this second conversation?

A. That was along about the latter part of September.

Q. Who was present?

221 A. No one.

Q. Go on and state all that was said in that conversation between you and him.

A. I asked him; I understood they had found something pretty good, and I said it is about time I found out where I got in on it, and he said, "John, I will tell you; I took in Johnson and Leeds." He says, "I thought it would be more to my advantage to take them in." He says, "If it amounts to anything, why, you will be in it all right; just say nothing and it will be all right."

Q. When was the next conversation you had with him?

A. As I say, I do not know what time it was; it was the time he had a car-load of ore on the track.

Q. After the time of the possession and work on the mine?

A. Yes, sir, taking the ore out and doing the work.

Q. Wasn't that in November?

A. I do not remember.

Q. How long after that second conversation, how many weeks?

A. Five or six weeks maybe; I could not say.

Q. Fix it as well as you can?

A. I say 5 or 6 weeks.

Q. Do you think this second conversation with him occurred the latter part of September and this conversation about the car-load of ore and the borrowing of the $100, was 5 or 6 weeks afterwards?

A. I judge it was.

Q. What was said in that last conversation at the time he borrowed the $100?

A. He came to me and said there was a car-load of ore on

222 the track out of the Washington and that he wanted to take it to Denver and was short of money, and wanted me to advance him $100, and he thought the ore would turn out to a pretty good advantage, and said "I will make it all right with you."

Q. This was all that was said at that time?

A. That is all; I gave him the $100 and he went to Denver.

Q. I believe that is all the conversations you have testified to with Fagaly, is it not?

A. Yes, sir, I believe that is all.

Q. Now you say you had a conversation with Lee Walker; w

was that; at your house; the first conversation, not the one when Heacock was present?

A. The first conversation at my house?

Q. Yes, sir.

A. That must have been; I do not know—it might have been one year ago last April or the first of May. He came up one afternoon and fetched me up a lot of specimens for my specimen case.

Q. You say that was to the best of your recollection—was in the spring of 1895—one year ago last April, 1894?

A. No, I mean last year.

Q. It was last year?

A. Yes, sir.

Q. Last spring?

A. Yes, sir.

Q. In what month?

A. I say it must have been along in April or May.

Q. Who was present?

A. My wife was there when he came into the house but we went out on the porch and sat on the porch and talked.

Q. What was said in that conversation?

223 A. He was trying to say it that he wanted his interest deeded over to his wife and he was studying whether to do it or not.

Q. Was that all?

A. I believe that is all we talked about.

Q. And all that was said to you by him at the time you had that conversation with Heacock is what you have already stated?

A. Yes, sir.

Q. He didn't want you to do him any harm?

A. I told him I didn't intend to do anybody any harm.

Q. When was that?

A. It might have been along possibly in June; I do not remember exactly.

Q. This last June?

A. Yes, sir, it must have been three or four months before he died.

Q. What time in June?

A. I would not say it was in June.

Q. You had an interest in the faro bank and had closed it up you say before that conversation, at the time you had the first conversation in September, 1893?

A. Yes, sir.

Q. Did you keep any books about your bank?

A. No, sir.

Q. By which you could fix that date?

A. No, sir.

Q. You can't fix it by Sturgis' books?

A. I do not think so.

Q. Did you make any memorandum about that $100 you let Fagaly have?

A. No, sir, none at all.

Q. You haven't any way of fixing that date?
A. No, sir.

224 COUNSEL FOR DEFENDANTS: "I object to that testimony."

The COURT: "As I understand the testimony the two first conversations he had with Fagaly were prior to October 23rd."

COUNSEL FOR DEFENDANTS: "Yes, sir, but one is harmless in itself. The ground of my objection to this testimony is that it is not binding upon these other defendants. Of course it is offered upon the conspiracy proposition and I insist that the position we have taken in this matter is absolutely impregnable, and the question is one of possession. The question is, did they take possession of the property at the time Pilkey was there holding for Lockhart; was Pilkey there at the time?"

The COURT: I think it would be competent according to the authorities read last night so far as it affects Pilkey, if it is admissible in other respects.

COUNSEL FOR DEFENDANTS: I will withdraw my special plea if that is the ground upon which it is admissible.

COUNSEL FOR PLAINTIFF: I object to his withdrawing it; we have proceeded with the issue already joined.

The COURT: I think he has a right to withdraw it. I rule out this testimony, and rule that no testimony is admissible except to show that Lockhart was in possession at the time that the defendants entered, and state for the information of counsel that I do not think any testimony admissible except that going to show Lockhart was in possession.

Counsel for plaintiff excepts to the ruling of the court in excluding the testimony of this witness; and also excepts to the ruling of the court in permitting counsel for defendants to withdraw special plea.

225 The jury returned to the box at the commencement of the next witness' testimony.

Mrs. STELLA A. METZ.

Mrs. STELLA A. METZ, witness for plaintiff, being sworn, testified as follows:

On direct examination she said:

Q. What is your name?
A. Stella A. Metz.
Q. Where do you reside?
A. 14 West Lead avenue.
Q. How long have you lived there?
A. Since 1883, February 1883.
Q. Were you acquainted with Levy Walker in his lifetime?
A. Yes, sir.
Q. Were you acquainted with Frank Fagaly?
A. Yes, sir.
Q. What is your occupation, and has it been?

A. Boarding and lodging house keeper at present. I am a printer by trade.

Q. Both Frank Fagaly and Lee Walker are dead, are they not?

A. Yes, sir.

Q. Where did they live prior to their death?

A. At my house.

Q. How long did they live in your house?

A. Lee Walker about 6 years. Frank Fagaly about one year altogether.

Q. At what time with reference to the time of their death?

A. Mr. Walker left my house in June, 1895.

Q. Having lived with you or in your house for 6 years?

A. Nearly; it was 1889, August 1889.

226 Q. Where did he die?

A. At Charles Pilkey's.

Q. Did you have any conversation with Lee Walker with reference to the Sampson mine?

A. Yes, sir.

Q. Did you have any conversation with Frank Fagaly in regard to that mine prior to October 23rd, 1893?

A. Yes, sir.

Q. Did you hear any conversation between Levy Walker, Frank Fagaly and Charles Pilkey with reference to that mine?

A. Yes, sir.

Q. Did you have conversations with them either singly or together prior to October 23rd, 1893?

A. The conversation occurred in my house between the parties.

Q. Between which parties?

A. Levy Walker, Frank Fagaly and Charles Pilkey.

Q. Please state what they said in that conversation or conversations with reference to the possession of the property known as the Sampson mine?

Counsel for defendants objects.

The COURT: I will rule that out upon the theory I have just announced that it does not tend to prove Lockhart's possession.

COUNSEL FOR PLAINTIFF: That is prior to October 23rd, 1893.

The COURT: The court announced whatever tended to show Mr. Lockhart's possession was admissible and that anything else was irrelevant.

COUNSEL FOR DEFENDANTS: I suggest that as the plaintiff wishes to make up his record that the jury be withdrawn and the testimony put on the record.

227 COUNSEL FOR PLAINTIFF: I am unable to understand the scope of the ruling of your honor. We are not offering this for the purpose of proving anything in regard to the plaintiff's possession. We assume we have already by the evidence introduced before the court shown there was an appropriation for the plaintiff here by Pilkey under his location of June 10th, 1893, and whatever is shown once to exist is presumed to continue until the contrary is shown. We are offering this testimony for the purpose of prov-

ing an ouster by Pilkey in connection with Walker and Fagaly during the period of plaintiff's possession under Pilkey; not to prove any prior possession of plaintiff here, but to prove the ouster by these three persons in pursuance of a conspiracy between them.

COUNSEL FOR DEFENDANTS: I understood the court to rule that this class of testimony, the same kind as was attempted to be elicited from the witness Neeland, to be inadmissible for that purpose?

The COURT: I understand that the defendants' plea admits they were in possession at the time suit was brought. Your testimony goes to prove Lockhart was in possession prior to the time that suit was brought, and therefore it is on the plea that you had possession and they had subsequent possession; that is established as soon as you establish the fact that Lockhart is in possession, and if that is true, haven't you been ousted?

COUNSEL FOR PLAINTIFF: The question is wrongful ouster from prior possession, and to show the wrongful character of the ouster that the testimony is offered, not the naked fact of possession, but that it was accomplished by fraudulent means which constitutes in law wrongful ouster.

228 COUNSEL FOR DEFENDANTS: If it was vacant ground the subsequent possession of defendants was lawful; if it was not vacant ground and was in the possession of plaintiff at the time it was wrongful: that is all there is in it. It is simply going over the same ground.

The COURT: The difficulty in my mind is to see what else there is left to the case. The defendants were in possession at the time suit was brought; that is admitted by the pleadings; therefore you are excused from proving that; now if you prove that you were in possession prior to the time suit was filed, why is not your case made out?

COUNSEL FOR PLAINTIFF: The declaration alleges that on October 23rd the plaintiff being in possession, entitled to possession, these defendants wrongfully entered upon that possession and ousted him on October 23rd, 1893. That is the issue first, whether as a matter of fact they did oust him at all. If that was the only issue in the case and we were not required to prove as part of our case-in-chief that the ouster was wrongful, and the presumption of law was it was wrongful, we would have made out a *prima facie* case; but the issue goes further to show this ouster was wrongful and that the plaintiff was then in possession or entitled to possession and at the time of the commencement of this suit entitled to possession, and if wrongfully ousted on October 23rd, 1893, and then entitled to possession, he would be at the time of the commencement of this suit, and all of this is addressed to show the wrongful character of possession which is admitted by the pleadings to be held at the commencement of the suit by defendants and the evidence is addressed to showing the wrongful character of the eviction or ouster.

229 The COURT: As soon as you prove that Lockhart was in prior possession, are you not entitled to a verdict?

COUNSEL FOR PLAINTIFF: We might possibly have, as I said before, stopped there in our case and introduced all of this testi-

mony in rebuttal of defendants' evidence; we might possibly have adopted that course, but we have seen fit to go into the whole case and the whole facts, as showing not only that we were in prior possession and the ouster but the wrongful ouster from it as part of our case-in-chief.

The COURT: That is exactly what counsel disagreed on, and it seems to me you have made out your case if Lockhart was in possession, and if that is so I do not see how anything else is relevant until they attempt to show their ouster was rightful. I sustain the objection.

To which ruling of the court counsel for plaintiff saves his exception.

COUNSEL FOR PLAINTIFF: For the purpose of making up the record can we make a statement of what we offer to prove?

The COURT: The jury will go into the other room.

The jury retire from the court-room and the examination of the witness on the stand is resumed during their absence for the reason above stated.

Q. Please state what was said by Pilkey, Walker and Fagaly to you prior to the first of October, 1893, in reference to the possession of the property known as the Sampson mine?

A. Well, my statements would go back to April of 1893 before the locations were ever made in regard to this matter, what I knew of it.

Q. By anybody?

A. By Levy Walker and Charles Pilkey?

230 Q. Statements made between June 10th, 1893, and the 1st of October, 1893; just state what was said by them in reference to the possession, if anything, of this property.

A. Well, I don't see how I could state it unless I begin at the beginning before the locations were made.

Q. Well, it is not necessary to go back beyond the time I have indicated.

A. Well, Mr. Pilkey and Mr. Walker entered into an agreement; he was going prospecting for Mr. Lockhart and Johnson, and that he was to retain—if he would provide for a woman in old town, he would retain and protect the best location made for them; when the time expired he could either relocate it or have some one relocate it and give him a silent interest in it, him, Pilkey, a silent interest in it, the best location, that he reserved for them, Pilkey and Walker.

Q. Where were these conversations?

A. In my house and at my table at different times.

Q. When did you first hear of the Sampson mine from them?

A. The latter part of June or the first part of July, I am not positive which.

Q. 1893?

A. Yes, sir.

Q. State what was said in reference to the possession of that mine at that time?

A. Well—whom it was in possession of?

Q. Yes.

A. The supposition was it belonged——

Q. Just state what they said.

231 A. That he had made these locations for Henry Lockhart and Ben. Johnson and himself.

Q. What locations?

A. The Sampson and the Columbus are the only two names I remember; there were other locations made I think but I do not remember the names.

Q. Who took part in these conversations when the Sampson was first alluded to?

A. No one but Mr. Walker and Mr. Pilkey.

Q. What if anything did Pilkey state with reference to having made the Sampson location for Johnson and Lockhart?

A. He made this location as he said he thought it was the best one and he would let the time run out and as I told you he said they would relocate it; he would let the time run out; Walker could relocate it or send some one to relocate it and give him a silent interest in this mine now known as the Washington.

Q. Was Fagaly present?

A. Not at that time.

Q. At any time were they three present before the first of October, 1893?

A. Yes, sir, in September.

Q. What time in September, about?

A. Between the 5th and 10th, but the day I do not remember.

Q. What, if anything, was said by Pilkey or either of the other two in reference to who then had possession of the Sampson mine?

A. Pilkey was guarding it for Mr. Walker, but the time hadn't—it was then too early to relocate it.

Q. What was said as to who was in possession, I asked you?

A. Pilkey.

Q. Who was in actual possession of the mine?

A. Pilkey was in actual possession of the mine.

232 Q. For whom at that time?

A. It still belonged I think to Lockhart and Johnson.

Q. What was said with reference to that?

A. Well, when the time expired he was to send some one to make the relocation.

Q. At that time he was in possession for Lockhart and Johnson?

A. Yes, sir.

Q. Why was it then too early for Walker and Fagaly to take possession?

A. I could not tell; I presume they thought it was not safe; I could not answer that question.

COUNSEL FOR DEFENDANTS: I object; let the witness state what they said.

Q. That is what I am asking, whether they said anything about it; not your own knowledge.

A. What they said about making the location?

Q. Yes; about why it was too early then for Walker and Fagaly to take possession?

A. Didn't I say they thought it was too early? They did say it was too early to make the relocation.

Q. But they didn't state the reason why it was too early?

A. No, sir.

Q. Simply the fact it was too early?

A. It was too early.

COUNSEL FOR DEFENDANTS: These conversations commenced before the location of any claims, and I submit this evidence would be perfectly competent if Pilkey had done what she says he was going to do; if he had located the mine, discovered the mine and located it on Government land in connection with Walker or
233 somebody else and it had been Government land and a bill in equity filed for enforcing the trust.

COUNSEL FOR DEFENDANTS: I have no objection to the testimony so far as it relates to admissions of Pilkey having any possession in Lockhart; otherwise I have.

The COURT: You just indicate that question as to possession so it can be reported to the jury.

COUNSEL FOR PLAINTIFF: Well, upon the coming in of the jury I would ask the questions directed to that part of these admissions of these parties.

COUNSEL FOR DEFENDANTS: It will avoid a good deal of trouble for the court to ascertain what testimony shall go to the jury.

The COURT: It is only as to that—what statements they made as to Lockhart being in possession that can go before the jury, and it is understood that all the rest of the testimony is a part of the record and all is excluded except that portion which relates to possession. That there may be no mistake you may simply ask—(an interruption, and here ensues a discussion in regard to the testimony of the witness already given, resulting in a reference to the notes of the stenographer which are read for the information of the court and counsel.)

COUNSEL FOR DEFENDANTS: I insist that it should be limited to declarations that Pilkey was then in possession under the Lockhart claim.

COUNSEL FOR PLAINTIFF: When the jury are recalled I propose to ask the witness as to statements made between the 10th of July and the 10th of October by Pilkey, Walker and Fagaly as to who was in possession of the Washington mine, and what was said.

The COURT (to witness): You will pay attention to the
234 court and the questions that are asked you when the jury return you are simply to tell what was said about who had possession between the 10th of July and the 10th of October; all other things said about their going to relocate and about the time expiring you will be careful not to state; it is simply the question as to whom Pilkey was holding possession for.

The WITNESS: Between the 10th of July and the 10th of October, 1893?

The COURT: Yes, and all questions about any agreement they had for Pilkey to have a silent interest, or about it being too early for them to relocate to shut Johnson and Lockhart out is not to be testified to by you, but only who had possession during these dates.

The WITNESS: You mean who were the owners at the time?

The COURT: Between that time, yes, if they — called owners.

The WITNESS: They held it in possession for Lockhart.

The COURT: You must tell what their language was as near as you can; do you understand now?

The WITNESS: Yes, sir.

Jury recalled and examination of the witness continued upon the grounds stated by the court to the witness.

Q. Will you state if you heard any conversations between Frank Fagaly, Levy Walker and Charles Pilkey between the 10th day of July, 1893, and the 10th day of October, 1893, in reference to who was in possession at that time of the property known as the Sampson mine, and if you heard any conversation between them upon that subject state it to the jury?

235 A. Who it was in possession of? Henry Lockhart.

Q. By and through whom?

A. Charles Pilkey.

Q. That is all, under the ruling of the court.

On cross-examination she said:

Q. What time did you hear this conversation between Pilkey and Walker and who did you hear make that statement, which one of them, Pilkey or Walker?

A. Pilkey made the statement to Walker.

Q. In your presence?

A. Yes, sir.

Q. When was that?

A. Well, it occurred at different times, between June and October; I could not remember the dates or how many times.

Q. You can't fix any dates?

A. No, sir; it occurred frequently, as I said.

COUNSEL FOR PLAINTIFF: Of course your honor understands we save our exception as to this other matter and ask leave to recall the witness, if necessary, in rebuttal, instead of in chief.

Q. Were any of these conversations in September that you heard?

A. In September?

Q. Yes, 1893.

A. I could not remember.

Q. Was any of them between the 10th of July and the 10th of October?

A. Between the 10th of July and September.

Q. Did you hear any in July?
A. Yes, sir.
Q. In August?
A. Yes, sir.
236 Q. You are not certain you heard any in September?
A. I am not.

The COUNSEL FOR PLAINTIFF: Under the view of the court as to the order of the testimony, the plaintiff will rest.

Close of the plaintiff's testimony-in-chief.

Adjournment until 1.30 p. m.

COUNSEL FOR PLAINTIFF: I wish to show that this possession of Lockhart, Pilkey and Johnson was with the license and consent of the owners of the Antonio Lucero grant in evidence, who were the claimants of this grant which has been put in evidence by the stipulation of counsel.

COUNSEL FOR DEFENDANTS: I object to it on that kind of offer. I do not think it is material but would like to have it made in another form.

The COURT: You can go on with the discussion without reference to it.

Motion to Instruct for Defendants.

COUNSEL FOR DEFENDANTS: I move the court to instruct the jury to find for the defendants, on the ground that there is no evidence to sustain a verdict upon the evidence adduced in favor of plaintiff.

(The balance of the afternoon is taken up in argument and citation of authorities pro and con upon the question of the motion to instruct.)

7.30 P. M

Ruling of the Court upon said Motion.

The COURT: In this case, without attempting to explain at
237 length the reasoning that has induced me to the present conclusion, I will state that it appears to me that from the admission by the defendants in this case to the fact that plaintiff Lockhart, or the interest he now represents, or parties whom he now represents, were in possession, that that carries the idea that the claim was staked, identified in that way, in accordance with the mining laws of the United States, and that such entry upon a claim of that sort even though it was not subject to the mining laws, would be, because of the nature of the property, an act towards taking possession of the property, and that if it were followed up with work on the claim it would have constituted possession to the extent of the boundaries defined according to the mining laws. Now, as to how soon it should be followed up with such use of the property as would constitute continuous possession, it seems to me the court should not absolutely determine as a matter of fact, but that that should be what would be a reasonable time, what would be considered a reasonable time, and therefore it seems to me that

that presents a question for the determination of the jury as to whether or not this taking of possession was followed up by such acts as would constitute a continuance of the possession which was taken. It may be in the rulings I have made in this case on that line counsel for plaintiff may have omitted to have put in proof such as would enlighten the jury as to what under the circumstances would be a reasonable time. I cannot distinctly say at this time whether counsel were misled by the court's rulings and thereby prevented from putting in proof of that nature, but I overrule the motion for instructing the jury at this time, and have set forth at length this much as I have merely to inform the counsel what are the
238 views of the court on that line.

Counsel for defendants excepts to the ruling of the court in overruling his motion to instruct.

COUNSEL FOR PLAINTIFF: To be frank with the court, whatever evidence may show as to monuments around this claim as to complying with the mining laws may be doubtful, yet we shall of course insist that if that is a requirement, if the entry of these defendants was upon that possession during the period within which under the law they were permitted to comply with those requirements, that the entry of the defendants, if shown to be within that period, was still in violation of their actual, legal, rightful possession.

The COURT: I indicated the reasons which induced me to this conclusion, and if in view of the court's ruling your testimony would still have been the same, that is a matter for you to determine.

COUNSEL FOR DEFENDANTS: As I understand the court, the court as the testimony stands,—(interrupted by court.)

The COURT: That there was prior possession is not of itself presumption of the right to recover, and the question as to whether there was abandonment or failure to do work or exercise such other acts of ownership over the claims as necessary, seems to me to be under the circumstances of the case a question of fact for the jury. I am induced to this conclusion by the decision I read this evening upon the question of the nature of the property and the necessity for its being worked, taking possession. I say that if this mere taking of possession under this form had not for an unreasonable length of time been followed up by work or other acts of ownership, such as the court could absolutely determine was an unrea-
239 sonable length of time, was not followed up within a reasonable length of time, that I would have instructed for the plaintiff. The jury will be brought back into the box.

Opening of the case on the part of the defendants with the jury in the box.

CHARLES PILKEY.

CHARLES PILKEY, witness for defendants (one of the defendants) being sworn, testified as follows:

On direct examination he said:

Q. What is your name?
A. Charles Pilkey.
Q. Where do you reside?
A. Here in Albuquerque.
Q. How long have you lived here?
A. I have lived here for about 6 years.
Q. Are you acquainted with Henry Lockhart?
A. Yes, sir.
Q. How long have you known him?
A. I have known him since about the first of May, since about the 5th of May, I know, about the 5th of May, 1893.
Q. Are you acquainted with Ben. Johnson?
A. Yes, sir.
Q. How long have you known him?
A. Oh, I have known Ben. some 10 or 12 years.
Q. How did you first get acquainted with him?
A. I knew him in Las Vegas first.
Q. Did you locate a mining claim called the Sampson, or attempt to locate a mining claim called the Sampson, in the Cochiti mining district, in 1893?
A. I did, sir.
240 Q. Look at that paper and state whether that is a copy of the location notice you posted on that claim? (Exhibit 16; same as Ex. 4.)
A. Yes, sir, that is; to the best of my knowledge I should judge it was.
Q. Did you ever see that copy, that is shown you, before, this particular copy?
A. I gave that to Mr. Lockhart; I never saw it before.
Q. When did you give that to him?
A. I think it was on the 20th of August, 1893.
Q. Where was it you gave it to him?
A. At the old cabin which is up in this Cochiti mining district, situated—it is on the Mammoth ground where I was living.
Q. And Mr. Lockhart, was he ever there in the Cochiti district where you were engaged at work between the 10th of July, the date at which this location notice bears, and the 20th of August, when you say you gave that to him?
A. Yes, sir, he was there on the 20th of August.
Q. I mean between the 10th of July and the 20th of August was he there?
A. He was there about the first of July.
Q. How long did he stay?
A. Well we went up from Wallace and staid there over night,

slept on the northwest corner of the Ellen L. I should judge it was near the line, of the northwest corner line of the Ellen L.; there was some spruce thicket there; he and I slept there together.

Q. That was before that claim was located?

A. Yes, sir.

Q. After that claim of the Sampson was located was he up there except on that occasion of August 20th, between that time and the 23rd of October?

241 A. He never was there but the 20th of August after that; that was the last time I saw him; ever saw him there; that is up at the claims. I have met him on the road and seen him passing since in 1894.

Q. I have limited my question to the 23rd of October, 1893; I do not care anything about his being there after that time; from the 10th of July to the 23rd of October, 1893, he was there only once to your knowledge?

A. The question, what was it?

Q. From the 10th of July, 1893, to the 23rd of October, 1893, he was only there once to your knowledge?

A. That once to my knowledge.

Q. Who came with him at that time, if anybody?

A. Why, Mr. Detrick, Sam. Detrick, with one arm off.

Q. Where did they stop?

A. They stopped there at the cabin, at my place.

Q. How long did they stay there?

A. They got there about sundown, between sundown and dark, and stopped the next day and the next morning we left and went over to what is called the Iron King; Lockhart and Detrick went down the Peno cañon up where the trail runs from Bland to the Washington.

Q. Did you go up on this Sampson claim at that time?

A. Yes, sir, I did.

Q. Who went with you?

A. Mr. Lockhart and Sam. Detrick.

Q. State what you did after you got up there?

A. Well, when we got there I expected it was 9 or 10 o'clock. Mr. Lockhart claimed to be very tired and sat down in the shade. I told him I thought a good deal of the lead and I broke off

242 rock all along on the ledge and threw it up to him. Mr. Detrick some of the time was up further north on the claim looking around. I expect we staid there about an hour examining the rock. He said he didn't think much of it. I told him I did. Him and Detrick decided that the Ellen L. was the best rock. We had come over the Ellen L. ground. When we left there we bore to the west where the Ben. Johnson claim was kept down the ridge. I says "Here is the Ben. Johnson claim," but he didn't care to go and look at it, and I thinks, if you don't care, I know Detrick and I went. I brought some off of the Sampson. We went along. If Mr. Lockhart took any, why, I did not know it; he had it in his pocket unbeknowns to me. I carried it in my possession what I gave him to bring down.

Q. Where did you go?

A. We went along that ridge until we got to what is called now the Monster there. They talked about that and called it glass.

Q. Never mind about that, where did you go after you got through examining the Sampson?

A. Along that ridge south, a little west.

Q. I am not asking you what you did about any other claim except the Washington. Where did you go finally; did you go back to the cabin?

A. Yes, sir, along that ridge to what is called the Monster and then down to the cabin.

Q. After you got to the cabin was anything said about this Sampson location between you and Lockhart?

A. He said he didn't think it amounted to anything; it was too hard and close and he thought my judgment was of no value.

Q. Did he take any of the mineral away from there—

243 where did he go?

A. We ate dinner at the cabin.

Q. When did he come back to the Albuquerque or leave there?

A. Well, that evening we went up to see what to do about the work on the Ellen L., and after that, after we had decided where to do the work on the Ellen L., I came down and put a blast in the Mammoth; took out about 50 pounds or 60 pounds of rock; put it in a mail sack; it was one of these that have a strap on them, and we then went to the house. Next morning I sent a Mexican boy I had there to get one of my horses to take it to Wallace, starting him on ahead. Mr. Lockhart and Detrick and I went up the cañon from the old cabin until we got opposite where Bland is; we went down from the ridge (or over the ridge) backbone there was across what is now called the Black Girl, I had located it the Columbus, and went to the Iron King. There was an old tunnel there worked into it I expect 10 feet. He wanted some of the rock off it or that was in the tunnel. We broke off and worked at it until we broke the handle of the pick; he took it with him, and we started below, coming towards Wallace. I came down the cañon with him as far as where Bland is situated now and then turned south and went over the ridge to the cabin where I was at work.

Q. Where did he and Detrick go?

A. They went down and started on the way to Wallace. The boy I sent with the rock was to meet him; they were to catch up with him or meet him at Wallace, he was to go to Wallace and find them there, if he didn't see them on the road to keep on until he got to Wallace. I never saw any more of Mr. Lockhart until October, I think it was the 3rd.

244 Q. Then you didn't go back to the Washington any more after the day you were there?

A. No, sir, the nearest we went to it is where the assessment-work was done on the Gold Mary, or where it is now; there was no Gold Mary then.

Q. Did Lockhart take any ore away with him that was supposed to come from the Sampson?

A. Yes, sir, I gave it to him, had it tied up in a rag separate from the Ben. Johnson.

Q. Was anybody present when you gave him this ore?

A. My wife was present and also Detrick, because she went and got the location papers and the rock laid where part of the log was cut off for a window, and she says, "Ain't you going to send this rock" and I said yes and she ties it up in a rag and gave it to me and I gave it to Mr. Lockhart.

Q. Who gave him this copy of the location notice?

A. Sir?

Q. Who gave Mr. Lockhart this copy of the location notice?

A. I gave it to him myself.

Q. Where did you get it at the time you gave it; you said something about your wife getting the location notice?

A. It was in an old vest of mine with the Columbus and Ben. Johnson and she went and got it and took it out from under the mattress and she tied up the rock in the rag and I gave them both to Mr. Lockhart.

Q. After she brought the location notices to you, you handed them to Lockhart?

A. Yes, sir, I might have forgotten it.

245 Q. Whose handwriting is that in (handing paper)?

A. Well, I should judge it was my wife's.

Q. Is that a copy of the one you put on the claim?

A. Yes, sir, it is.

Q. Where was the location notice posted on the claim?

A. Why, it was not posted; it was in a little pile of rocks throwed up that way and stuck in so it would not blow away and a large rock put over it to keep it from getting wet; I expect a dozen rocks or so of the ledge rock. Mr. Lockhart was there and I showed him and told him the location is in that monument. He never saw it on the tree; there never was one on the tree.

Q. Did he look at it?

A. No, sir; he didn't care; not of my knowledge; I was there present all the time.

Q. What was done to this tree?

A. Well, there was nothing done to the tree more than it had the bark knocked off it. I didn't. I know the turpentine had run down on the place where it was barked.

Q. What monument, if any,—in the first place describe that monument in which the location notice was posted.

A. It was laid up agin, it was built agin the tree where there was a little trail, a trail that went up the ridge and close to this tree, built right beside that, and it was well nigh over a dozen rocks, small ones. (Witness illustrates with his hands) and this (the location notice in his hands) was put in that monument.

Q. What other monument did you erect on that claim?

246 A. No other, sir; that is all the work I ever done on it under this location notice or any other.

Q. What other work, if any, monument or anything else, was

done on that claim between the 10th of July and the 23rd of October, 1893?

A. There was nothing else at all, nothing but that I say.

Q. What, if anything, did you ever hear from Lockhart about the ore which he took away from this Sampson claim?

A. I never heard nothing from that, or the Ben. Johnson nor from the mail sack of 50 pounds out of the Mammoth. I never heard whether he throwed it in the yard or had it assayed or no. I never heard anything from it.

Q. After this time, when did you next see Henry Lockhart, after this trip he made up there?

A. Here in Albuquerque.

Q. Where in Albuquerque did you see him?

A. I went to see him for what work I had done on the Ellen L.

Q. Did you have any conversations with him about the claims you had up there?

A. Yes, sir; I told him I wanted to settle with him and I wanted him to pay me for the work I had done on the Ellen L. He was sitting looking out of the window in the office.

Q. What office?

A. In his office in Albuquerque. I says—he says, "I never agreed to pay you anything." I says, "I never agreed to work for nothing; I can't work on wind; all I want is what is mine. I don't want any more." Well he says, "I won't pay you nothing." So I went and saw Ben. Johnson. Ben. said he had no money, and
247 I ought to go to Mr. Lockhart and have him settle. That, I should judge, was the 4th; that was the 4th day of October, 1893. I got hot about it and told him if I didn't earn nothing I didn't want nothing, but I thought it was wrong to beat a man out of his work.

Q. How much work had you done on the Ellen L.?

A. Well, I cut 12 feet before I got under cover, and 19½ feet on from that to the ledge; it may have caved in since, but that was measured; my wife helped me measure it.

Q. How much did you ask him for that work on the Ellen L.?

A. I told him I thought it was worth $90.00, but I would lose $30.00 on it, and for him to pay $30 and Ben. Johnson to pay $30, but he would not make any settlement at all.

Q. That was on the 4th of October you say?

A. Yes, sir; I says, "Give me $15.00." "I didn't agree to pay you nothing," he said.

COUNSEL FOR PLAINTIFF: I object formally to this testimony as being irrelevant and immaterial.

THE COURT: I think he has a right to go into that conversation

COUNSEL FOR PLAINTIFF: If shown to be the same conversation.

A. That conversation passed between Mr. Lockhart and I.

Objection overruled and exception by counsel for plaintiff.

Q. Go on and state what the conversation — you had with Lockhart at that time.

A. I left hot and started down, came down to the corner there of Railroad avenue. There I met Lee Walker.

248 Q. I don't care about Walker, I am asking you about what passed between you and Lockhart; did you go back and see him afterwards?

A. Yes, sir, when I found out he had lied to me about the assay.

Q. Go on and tell what you said to him about that.

A. I said to him, "You are a fraud"——(objection in regard to the assay unless it was in regard to the Sampson claim).

Q. What did you say to Lockhart about any assay?

A. That is all I says to him, "Why didn't you tell me the truth when you were up there about what the rock run." He says, "I did." Well, I says, "You are"—I don't know whether I have a right to use it here or not.

The COURT: Yes.

A. I says, "You are a liar." He says, "How do you know?" I says, "Ben. Johnson told me." Ben. had given me an order to go to the assayer and get a duplicate. Mr. Harris' son, the old man's son, wasn't in. The old man said he had no right——

The COURT: Never mind that.

Q. What passed between you and Lockhart, that is all I am asking you about?

A. I told him to give me an order for a duplicate and he done so.

Q. Where is that order (counsel is handed order)? Look at that paper.

A. Yes, sir, that is the order. (Marked "Exhibit 17 or 7.")

Q. He gave you that order on Harris to furnish the assay?

A. Yes, sir.

249 Q. What did you do after you got the order?

A. Well, I expect I said more than I ought——

Q. Go ahead and say what you said to Lockhart.

A. I said "I expect I am not the first one you have defrauded, and I know now you are a fraud, and I want that agreement of ours that is between us." He says "You will never get it." I says, "That is all right, I will do nothing more under it and have nothing more to do with you; you are not the kind of stock I have been used to and you can stick it up your arse."

Q. What date was this, did you say?

A. This occurred on the 5th.

Q. That was the next day after you first talked to him?

A. Yes, sir.

Q. Go on and state all that occurred there.

A. Well, I never had any more words, never spoke to the man after I left the office. I went down and got my duplicates and that settled my business with him ever since and I hope always will.

Q. Did you have any talk with Ben. Johnson?

A. Yes, sir; I went to Ben. Johnson and rounded him up. He said he wasn't to blame——

Q. When was it you saw Ben. Johnson?

A. Well, I saw him—I saw him on the 4th, and I saw him that evening after I got that order.

Q. Go on and state what you said to Ben. Johnson.

A. He said I ought not to feel hard towards him, that he didn't bring the rock; it was not sent to him and he didn't have no assay of it. He says, "I thought the matter over," and he gave me an order to go over there and get it, the duplicate, and they would not give it to me; and if they had given me the duplicate on
250 Ben. I would not have gone to Mr. Lockhart. The assays were not in Ben.'s name and Mr. Harris would not give me the duplicate.

Q. What did you tell Ben. about the claim, especially the Sampson, if anything?

A. I says to Ben. Johnson, I thought, "I always thought you were a friend of mine." He says, "I am." Well, I says, "Why did you steer me up agin such a man as Lockhart." He says, "I didn't know he was that kind of a man." Well, I says, "I will have nothing more to do with you nor with him in anything." I says, "I would rather lose what I have got up there, let it go to the devil, the more I would get the less I have." I says, "There is the claims that I have located up there; if you want them go and take them." He says to me, "You go up and locate them up for his brother."

Q. Whose brother?

A. "No, sir," I says, "I will not do anything of the kind, but if you want to go you put the grub in that wagon and I will not charge you nothing at all as you claim you are innocent of this; I don't want nothing of him or anything to do with him." He didn't. He says, "I will see." So I told him I wanted him to pay me for my work I had done on the Ellen L. He says he was hard up for money and didn't have any and could not pay me. He says, "When I get it I will pay you." I says, "All right."

Q. Did he afterwards pay you?

A. He did, sir, he paid me.

Q. When?

A. It was some time in March, 1894.

Q. How much did he pay you?

A. He gave me $30.00 and I gave him a receipt for it for
251 his undivided one-third interest in the Ellen L. work.

Q. Did you ever have any conversation with Ben. Johnson between the date of this conversation you have narrated and the 23rd of October, 1893?

A. No, I passed him by and never talked any more. I didn't think—I thought he kind of an old man, and never paid any more attention to Ben., never got hurt at him; he assured me it was not his fault and I let him be, always did.

Q. Where were you between this date at this conversation with Johnson, the 5th of October, and the 23rd of October, 1893?

A. I was here at home not where I am living now but another house adjoining that.

Q. Did you leave Albuquerque between those dates the 5th of October and the 23rd of October?

A. No, sir, not once. I went below town here; I don't think I was one day out of the town to my knowledge.

Q. Did you go up to the Sampson mine between those dates?

A. No, sir.

Q. How near were you to the Sampson mine between the 5th of October and the 23rd of October?

A. I was——

Q. What was the nearest point?

A. As near as I am now.

Q. No nearer?

A. No, sir.

Q. That is you mean to say you were no nearer than Albuquerque?

A. No, sir.

Q. Do you know Mrs. Metz, the woman who testified here today?

A. Yes, sir.

252 Q. Were you ever in her house?

A. I have been in her house; yes, sir.

Q. When were you first in her house?

A. The first time I ever was in her house was after Mr. Lockhart started this suit. I was—I went once there for a mineral glass. Lee Walker was asleep. I went in the back way and the lady there went into the house and got it and I went off.

Q. You heard her testimony about your making a statement to her about the possession of the Sampson mine; was that true or not, or to Walker in her presence.

A. O, I never made no statement whatever.

Q. Were you in her house during the period she fixes, between the 10th of July and the 23rd of October?

(Objection, leading. Overruled.)

A. I was never in her house in the year 1893.

Q. What, if anything, did you hear from Lockhart about the assay or the value of the ore that he took away from the Sampson?

A. I never heard nothing of it.

Q. What did he ever tell you about doing any work on the Sampson?

A. He never told me anything about doing any work on it. I says, "Take this rock," that I gave him off the Sampson "and if it is worth doing the work on send me up some provisions and when I get through with the work on the Ellen L I will do the work.

Q. Did he send the provisions?

A. No, sir; he didn't; I had to get them with what money I had and went to Peno Blanco. To finish the work on the Ellen L, getting to the ledge I cut into the hill in the tunnel.

253 Q. How many people did you have to feed up there, take care of up there while you were doing the work up there?

A. My wife and a little boy.

Q. Was it your little boy or a boy you had hired?

A. No, sir; on the Ellen L I had no one to help me.

Q. Your own little boy?
A. Yes, sir; my own little boy; my wife's little boy.
Q. Who helped you do the work on the Ellen L and the Mammoth you did up there?
A. My wife helped me do the contract work of twenty feet on the Mammoth; after that I had a Mexican boy to help me when he wasn't bringing the water, when he went after water or done anything else my wife helped me, she held the drill and I struck it.

"EXHIBIT 18."

The undersigned citizens of the United States over the age of 21 years, having complied with all the requirements of the United States and territorial laws now in force relative to mineral locations, and with all local customs and regulations in force relative to such locations ha- located and do hereby claim the right of discovery and location, 1,500 lineal feet on and along this lode vein deposit of mineral-bearing rock in place, together with 300 feet of surface ground along and on each side of said 1,500 feet. The claim hereby located is situate. in the Cochiti district mining district, county of Bernalillo, Territory of New Mexico, and is more particularly described as follows: Situated in Peno cañon of white and grayish quartz.

254 Beginning at a monument of stones (monument No. 1) erected on said lode, lead and deposit; said monumnent number 1 being the north end monument of this claim and being the center of the north end line of said claim; thence west 300 feet to a monument of stones (No. 2); thence south 1,500 feet to a monument of stones (No. 3); thence east 300 feet to a monument of stones (No. 4); said monument number 4 being the south end monument and the center of the south end line of this claim: thence east 300 feet to a monument of stones (No. 5): thence north 1,500 feet to a monument of stones (No. 6); thence west 300 feet to the place of beginning.

And for further description running in south direction will find a monument of stone erected in center of claim on lode and ridge about 200 yards from bottom of Peno cañon with mining matter.

This claim was located July 6th, A. D. 1893, and shall be known as the Columbus mine. A copy of this notice is placed on monument No. — center of claim.

CHARLES PILKEY,
BEN. JOHNSON,
HENRY LOCKHART, *Locators.*

Notice posted on claim in presence of—

ADA PILKEY.
LEE DUDLEY.

TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

This instrument was filed for record on the 9 day of December, 1893, at 11 o'clock a. m. Recorded in volume F of Mining Records of said county, folio 7.

J. W. HARRIS, *Recorder.*

255 (Note by stenographer.—There is a notation simply of the above location notice as "Exhibit 18" in my note book without any statement from counsel as to its introduction at this time, if it was intended to be introduced, but it is supposed it was the intention that it should be introduced and therefore is made a part hereof with this explanation. In the hurry of reporting exhibits marked 16 and 17 were previously introduced as Exhibits 4 and 7, respectively, without their former exhibit mark when marked again as Exhibits 16 and 17.)

On the cross-examination of the witness CHARLES PILKEY:

Q. What is your occupation?

A. Well, I am prospecting; that is what I am doing most of the time. For mines.

Q. How long have you been engaged in that business?

A. Off and on for 30 years, more so in my younger days. I was in the sheep and cattle for several years.

Q. Can you tell what the business of a prospector consists of; what sort of business it is?

A. What do you mean by the term prospector?

Q. Yes, sir.

A. Well, going out looking for silver or gold mines; that is the way I look at it; it may be right and may be wrong.

Q. That you have been engaged in for 30 years?

A. Yes, sir; not all the time.

Q. In what localities have you been engaged in?

A. Nevada.

Q. All the time in Nevada?

A. No, sir; Montana, old Mexico and here and Arizona.

256 Q. And New Mexico?

A. Yes, sir.

Q. When did you come to New Mexico?

A. I have been off and on to New Mexico; I used to come here to buy sheep 20 years ago.

Q. To reside, I mean, to live?

A. I came into New Mexico with the Santa Fe railroad, with my first wife; it was this side of the Raton mountains, that first station; this side of the Raton mountains.

Q. Do you remember the year?

A. I think it was—well, I am not certain. I expect you know the year; I know the railroad was there.

Q. 1880, wasn't it?

COUNSEL FOR DEFENDANTS: 1879. (For information of counsel for plaintiff.)

Q. Did you know Levy Walker?

A. I did. I knew him in Colorado.

Q. Do you know Frank Fagaly?

Counsel for defendants objects as it is not proper cross examination, and counsel for plaintiff states the question is merely preliminary and the court sustains objection.

Q. You state you came here to Albuquerque from this mine about the 3rd of October, 1893?

A. Yes, sir, I believe it was the 3rd day of October.

Q. When had you been here in Albuquerque next previous to that date?

A. I think it was in July; I know I was here the last of June, and I think I came back in July for something.

Q. Then the next previous time before the 3rd of October
257 was July, and when was the next time previous to that, previous to July, before July?

A. Before July?

Q. Yes, sir.

A. In June when I finished my work on the Mammoth. I came down.

Q. When did you go up to this Cochiti country?

A. I went up there in February, 1893.

Q. And had you remained there continuously from February until you came down the first time in June?

A. No, sir; I was with my wife and I was traveling, buying wool, pelts, hides and anything I could make a dollar on, and whenever I had a chance I was prospecting and would see anything that I thought was worth anything I would stop and dig at it a while, and I took my wife and left her at Canada, a little town north of the Cochiti Indian village.

Q. Did you understand I was asking you anything about where you left your wife?

A. I went from there the next morning.

Q. Did you have any agreement with Lockhart and Ben. Johnson to prospect in that country for them in 1893?

A. Before I went there on this occasion?

Q. I say at any time in 1893 did you have an agreement to prospect for Lockhart and Ben. Johnson in the Cochiti country for mineral?

A. I had an agreement to sink a 20 foot on the Mammoth ledge with Mr. Lockhart and Ben. Johnson.

Q. When did you have that?

A. That was I think, the first of May, along there about as near as I can tell.

Q. That was the only agreement you had with them to prospect for them?

258 A. Well, I do not know whether you would call it prospecting; that was all the agreement I had; I never had no other agreement that I know of.

Q. Can you read and write?

A. Well, a little; I can read my own writing.

Q. Will you look at this paper (Exhibit 1) and state if that is your signature to it?

A. Yes sir, that is my signature.

Q. After signing that agreement how soon did you go up to this Cochiti country?

A. Just as soon as Mr. Lockhart got the things for me to put in the wagon, I expect an hour.

Q. What did you go up there for?

A. I went up to do the work on this Mammoth claim.

Q. Had there been any claims located at that time up there?

A. I hadn't seen any located.

Q. This was dated May 7th, 1893, this paper. At that time had there been any locations of any sort made in that region?

A. Who by?

Q. By any one.

A. I found some after I went there located with stakes several places; whether they had run out or not I did not know; I never paid no attention.

Q. Had you located any claims there at that date?

A. Before this contract was entered into?

Q. Yes, sir.

A. I had discovered this Mammoth claim there and brought some of the rock down.

Q. Had you located or attempted to locate it in any way?

259 A. No, sir, I didn't think there was any danger of any one locating it before I found out what the rock run; if the rock run anything and it was worth anything I could go back; I knew where it was. I just simply discovered it, that was all.

Q. As a matter of fact you had made no locations whatever, had you, prior to the date of this agreement, in that vicinity?

A. Nothing more than the discovery, sir.

Q. Had you done anything in the way of taking or claiming possession of any particular vein prior to that date?

A. I did not.

Q. Who did you first converse with in regard to mineral deposits in that vicinity, at or prior to this date May 7th, 1893?

A. Well, I talked with Lee Walker whenever I was out and found any rock I brought it in and gave it to him and he sent it off to have it assayed. I gave him some of this. I do not know who all I brought, except some that Johnson got, whether they got it from me or Ben. Johnson; whether Johnson got it from Lee Walker or from me I do not remember, but I rather think he got it from Lee.

Q. Did you talk with Frank Fagaly also?

A. No, sir, I did not know Frank Fagaly.

Q. How long had you known Lee Walker?

Objection because defendants never went into the acquaintance with Lee Walker. Objection overruled.

A. I knew Lee Walker when he was freighting from Cañon City to Loceto; that was I think, 1876 or 1877. I had sheep between Loceto and Cañon City. He was freighting. I traded him a mule for a horse; that was my first acquaintance with him.

Q. You had known him then from 1877 up to May 1893?

260 A. Yes, sir.

Q. What agreement, if any, or understanding had you with Lee Walker with reference to claims that might be discovered by you in prospecting?

Objection. Sustained. Exception.

Q. To whom did you first show the specimens of ore prior to May 7th, 1893, that you had obtained in the Cochiti country?

A. Ben. Johnson was the first man in Albuquerque that saw the ore that I brought. I drove over to the wool-house and had it in the front of my wagon and showed him some goat skins I bought up there and my wife was sitting in the wagon and the rock laid down at her feet. I got it and took I expect the largest piece that had some perities in it and Ben. and I was looking at it inside at the south door of the wool-house.

Q. When and in what way were you first brought into communication with Henry Lockhart and the signing of this paper?

A. Well, I took the rock home over here where I was stopping, and that evening I think I took all but one piece, or I might have taken it all over to new town and Lee Walker and I looked at it in a little room there in a saloon and I left it with him, and told him to, asked him if he would send off some of it and have it assayed and he said he would.

Q. Do you understand that answers my question as to when you were first brought into communication with Henry Lockhart with reference to this ore?

A. Well, Ben. Johnson was the first man that brought me to Mr. Lockhart.

Q. Did you show Lockhart these specimens of ore you brought down from there?

261 A. No, sir; I did not.

Q. Or did Ben. Johnson show them to Lockhart in your presence?

A. No, sir; he did not.

Q. You don't know whether Lockhart had ever seen specimens from there or not at the time this paper was signed on May 7th?

A. If he did he didn't get them from me.

Q. Who had you left them with?

A. I left them with Lee Walker.

Q. Did you ever see these specimens afterwards?

A. I do not remember that I did; I might have; I do not say I did not.

(COUNSEL FOR DEFENDANTS: Your honor will understand that all these specimens are not connected with the Sampson location and I object to the testimony for that reason.)

Q. You have stated that as soon as you got supplies and provisions after this paper was signed you went back up to that country?

A. Yes, sir; that same morning.

Q. For what purpose?

A. To work on this claim called the Mammoth.

Q. Was there any claim at that time called the Mammoth, or any claim called anything up there?

A. No; I called it the Mammoth afterwards, but it was where I brought this rock from.

Q. Did you or not go in pursuance of an agreement you had signed with Ben. Johnson and Lockhart?

A. Yes, sir.

Q. When did you locate any claim under that agreement and what claim was it?

A. I located it when I locaated the first one, the Mammoth.

Q. In whose name did you make that location?

262 A. I made it in Ben. Johnson's and Henry Lockhart's and mine.

Q. What did you do for that purpose; did you post any location notice on it?

A. I put up a monument or rock, rolled the location up in a paper, put it in a can—rolled the location paper up I think in some rocks and paper and put it in a can and the can upside down and covered it with rock. Mr. Lockhart saw the location, took it out and read it.

Q. You have been prospecting for 30 years you say?

A. Not steadily all the time.

Q. Was that or not the usual or customary method of posting a notice for location upon a discovery or lode claim?

A. Well, the custom I expect depends upon what you find; if you don't get nothing it don't make any difference; that is the way it has been with me. If I find anything I fix it so that I have a right to it, but if there is nothing in the rock I do not care who takes it; that is my custom, putting it in there so it would not get wet.

Q. You regard that as an answer to my question do you?

(Court instructs stenographer to read former question.)

A. Whether it was the custom; it was my way and the way I done it, Judge.

Q. As a mining prospector for 30 years do you or not know what is the custom or customary method of posting notices of location upon the discovery of a lode, or mine?

Objection as not cross-examination; sustained; exception.

263 Q. You say you did discover the Sampson mine; how soon after the discovery of the Mammoth was that?

A. I located that on the 10th of July.

Q. What did you do upon your discovering it, with reference to claiming or taking possession or locating it?

A. I laid up a few rocks to the side of a tree and put my location paper in it. I had no can or I would have put it in a can.

Q. I will ask you whether that was in the usual and customary

method of posting a notice of location upon the discovery of a mining lode?

A. Well, whether it was law or not it was my custom; it was the way I done it anyway.

Q. What was the difference between your method of posting a location notice upon the Sampson and the Mammoth, if any?

A. What was the difference?

Q. Yes, sir.

A. Nothing; only the Mammoth had a can when I put it in and the Sampson didn't.

Q. Well, the Mammoth location was a good one because you had it in a can, is that the idea, and the Sampson was not, because you did not have a can?

(Objection; overruled.)

A. No, I had no can at the Sampson to put it in.

Q. If you had had a can you would have put the notice in a can and the can with the notice inside in a pile of rocks?

A. Yes, sir.

Q. Not having the can you put the location notice in the pile of rocks without having a can?

264 A. I laid down one rock and covered it the best I could from anything to get it off.

Q. Now you said that this pile of rocks in which you placed the location notice was near a tree; will you describe that tree?

A. It was a tree, I expect, maybe two feet through; it was a pine tree.

Q. Was it or not a prominent or conspicuous object, that tree?

A. I do not know; it happened the rock was the easiest to get there and I throwed it up against the tree to make one side of the monument. If I had found any place with more rock I would have laid it there; it didn't make any particular difference.

Q. You understand that is answering my question whether or not this two-foot pine tree was or not a conspicuous object on the claim?

A. There was a good many trees there; I do not know it was any more of a curiosity than the balance of them.

Q. You say this tree had the bark off?

A. Yes, sir, it had the bark off.

Q. On which side was the bark off?

A. On the south side.

Q. I understood you to state you didn't chip the bark off or blaze it.

A. No, sir, it was covered over with turpentine.

Q. Was that bark being off of it the natural condition of the tree or had it been chipped or cut off in some way?

A. I could not say as to that.

Q. It was a mere accident then you placed this pile of stones with the location notice in it near the pine tree two feet in diameter with the bark off on the south side, was it?

265 A. No, sir; there was more rock there than any other place and I throwed them up against the tree and put it in there.

Q. The location notice which you placed in this monument of rocks near the tree, describes this tree, this pine tree, doesn't it?

A. Yes, sir, I believe so.

Q. Previous to the posting of the notice what had you done in the way of tracing the vein?

A. I had done nothing more, I expect—I went 50 or 60 yards north of where the location was and I expect the same south. The first time I saw it I was hunting my horses.

Q. That was after you had discovered and located the Mammoth, was it not?

Q. Yes, sir.

Q. How long after?

A. Well, from the time that the location was on the Mammoth until it was put on to the Sampson it was from May to July; I could not say now what date the Mammoth was located; it was as soon as I got there anyway and I kept going.

Q. That is after signing this agreement on May 7th?

A. Yes, sir.

Q. Did that vein upon what you call the Sampson crop out above the surface?

A. Why, I could not ever have found it if it had not, Judge?

Q. Did it project any above the surface of the ground?

A. In some places.

Q. Did you trace it upon the surface?

A. No, I did not, I could see it from the point south where it run and could see it north from where the location was: there
266 was a good deal of rock there, broke and I kept a-breaking them and saw it was very good-looking quartz is why I located it.

Q. In that location notice how much of that lead did you claim?

(Objection, as location notice speaks for itself.)

Q. I see in this location notice that you claimed of that lead 1,500 linear feet along this lode, vein, deposit of mineral-bearing rock in place, and that the 1,500 feet is situated on both sides of a monument placed in the center of the claim by a pine tree with the bark off on south side; that would locate the 1,500 feet then as being 750 feet on each side of the place where this monument was placed by a pine tree, would it not?

Objection because a question of law for the court. Sustained.

Q. Part of this lode, this lead which you discovered you say projected above the surface of the ground?

A. In places.

Q. Did you trace it in its length each way from the tree where you posted this location notice?

A. The whole length?

Q. Yes, sir.

A. No, sir.

Q. Did you ever trace it its full length each way from that tree on the surface?

A. I never did.

Q. What was your purpose of posting this location notice there; what was your intention?

A. Why, to locate it.

Q. In pursuance of what? or as what?

A. I expect for what it was worth.

The COURT: In obedience to what sort of regulations or law?

267 A. Under what law?

The COURT: Yes, sir.

A. I did not understand it. Under the Government law, I expect, the same as you would locate any ledge.

Q. Precisely, and for what purpose or purposes?

A. Why, to work it and get something out of it if it had anything in it.

Q. To mine it; didn't you expect to mine it?

A. Yes, sir, that is what I located it for.

Q. Didn't you expect to hold it as a mining claim for the purpose of mining, or did you just do this for fun?

A. No, sir, I wasn't doing nothing for fun.

Q. You had some object in it surely?

A. Yes, sir.

Q. Now, in whose name and on whose behalf did you so locate and take possession of that lead on July 10th, 1893?

A. Henry Lockhart and Ben. Johnson.

Q. Why did you locate it in their name with yours?

A. Because I located the Mammoth that way.

Q. It wasn't because you had a written contract with Ben. Johnson and Henry Lockhart that you located that claim in that way, was it?

A. We had an agreement written out on a small piece of paper, and the agreement that I would locate and what they say to do and I say to do.

Q. You don't refer to this paper (Exhibit 1)?

A. No, sir, not that paper.

Q. So you had some other agreement on scraps of paper with them under which you located this Sampson?

268 A. Mr. Lockhart claimed in the morning when I signed that; he says thus: that we dictated and talked it over and he wrote it down; I think it was colored paper. I remember what most of the terms were; and he says I will just put it on the paper tonight; I says "All right," and I left that night.

Q. So your claim is that you located this Sampson lode which you discovered, as you have stated, in pursuance of those scraps of paper which were not signed, and not in pursuance of this agreement you did sign?

A. I supposed that was the same we had agreed on, Judge. I suppose this agreement was the same we had dictated the night before

and when I signed it, from what Ben. Johnson, recommendation he had given me of Mr. Lockhart, I had all confidence in the man and I walked right in and signed it. He might have had it for 100 years as well as one, I would not have known any difference. I put confidence in the man, and I don't want anything to do with a man I can't have confidence in.

Adjournment until 9.30 a. m., Saturday, February 15th, 1896.

The cross-examination of witness Pilkey is interrupted at this point by agreement in order to permit the testimony of Mr. Field to be given so that he would not be detained.

NEILL B. FIELD.

NEILL B. FIELD, witness for the defendants, being sworn, testified as follows:

On direct examination he said:

Q. State your name, residence and business.

269 A. My name is Neill B. Field. I live in Albuquerque, and I am a lawyer.

Q. Are you acquainted with Charles Pilkey?

A. Yes, sir.

Q. Are you acquainted with Ben. Johnson?

A. Yes, sir.

Q. Did you have any conversation with Ben. Johnson in regard to the relations between him and Charles Pilkey and Henry Lockhart under a certain mining contract that existed between them, which was supposed to refer to mines at Cochiti?

A. Mr. Pilkey consulted me in my professional capacity at one time with reference to certain mining property in Cochiti, and as a part of that consultation Mr. Johnson was brought there, but my impression has been all the time that Mr. Johnson was consulting me with Mr. Pilkey. I have no very clear recollection of the matter, Mr. Childers, and I certainly would not be at liberty to disclose that conversation without the permission of Mr. Pilkey, and I doubt whether I would be at liberty without the permission of Mr. Ben. Johnson; if it is desired I will explain my recollection of the matter.

Q. I will state to you that Mr. Pilkey consents; that I am appearing here as attorney for Mr. Pilkey and he consents for you to state the conversation.

Q. I have so understood from Mr. Pilkey.

COUNSEL FOR PLAINTIFF: You have never been released from any benefit of privileged communications by Mr. Johnson, Ben. Johnson.

A. I do not think that I have ever had any conversation with Mr. Johnson since the one about which I have been asked here.

Q. You did have at that time, you say?

A. I did have at that time.

270 Q. Ben. Johnson and Pilkey together—what litigation was it in reference to Mr. Field?

A. As I understand there was no litigation at the time.

Q. Contemplated?

A. Nor, as far as I know was any litigation contemplated. As I said Mr. Pilkey came to me for counsel with reference to certain rights.

Q. Is it not a fact that Mr. Pilkey came to you and consulted you and asked your advice about certain rights asserted by him under this contract and that he went off and brought Ben. Johnson there for the purpose of having him state some facts to you in relation to it?

COUNSEL FOR PLAINTIFF: I object to the form of question and before the witness shall answer I want an opportunity of cross-examining Mr. Field as to the circumstances under which these communications were made.

COUNSEL FOR DEFENDANT: The question was undoubtedly leading but I did not suppose counsel would object to a leading question to this witness or to the form of the question in any way affecting the answer of the witness.

The jury retire from the court-room.

A. The sending the jury out may relieve the court of an embarrassment but it does not relieve me any. I was about to say I do not know; that I have not a present recollection of this transaction sufficient to enable me to say positively that Mr. Johnson was not consulting me, and in that frame of mind it seems to me to be my duty to claim the privilege, unless Mr. Childers by his examination can refresh my recollection.

COUNSEL FOR DEFENDANTS: I ask the court to permit me
271 to call Mr. Johnson from downstairs and ask him something about this and whether he consulted Mr. Field as an attorney or went there simply for Mr. Pilkey.

A. I would like to state for the information of everybody that I have examined my books and done everything to refresh my recollection and I have been unable to do it. I find I made no charge for advice given on this occasion and I have but a very indistinct recollection of the conversation, as to the result of the conversation my mind is very clear, but as to the details I cannot remember. If Mr. Johnson should come into the court-room and say he never consulted me as an attorney and was willing for me to give my recollection I would be willing. I do not propose to tell except under Johnson's permission or the instructions of the court.

COUNSEL FOR PLAINTIFF: I object to Johnson testifying at this time as to a collateral matter and injecting it in what we are proceeding with.

THE COURT: Unless you withdraw your objection Johnson will not be permitted to testify at this time.

The jury recalled into the court-room.

(Witness Field retiring from the witness stand for a few minutes, and upon returning answers as follows:)

A. I am prepared to answer the questions.

Q. I am asking you to state what was the general substance and effect of the conversation you had with Ben. Johnson as to the relation and conduct of Henry Lockhart with the defendan Charles Pilkey in regard to this mining contract.

A. In answer to this question I desire to say, I have seen Mr. Johnson and he has stated to me he never consulted me in the capacity as attorney in connection with this matter, and
272 he never made any communication to me as his attorney under any circumstances. It is utterly impossible for me to undertake to state the details of this consultation. Mr. Pilkey presented a paper and asked my opinion about certain rights in connection with it. If I could see that paper it would refresh my recollection somewhat as to the details of the conversation. (Exhibit 1 handed witness.)

Q. I will ask you to read that paper and state if that contains the same matter as the paper that was shown you. (Witness reads same.)

COUNSEL FOR PLAINTIFF: I object. Ben. Johnson is not a party to this suit and the only ground upon which any statement made by Johnson could be made evidence would be by showing his relation at the time of the conversation that was about to be detailed.

COUNSEL FOR DEFENDANTS: He was a party to the contract, and there is a deed in evidence, a paper purporting to be a deed in evidence, dated, I believe, since this suit commenced, or acknowledged since this suit commenced, and that is in evidence, and the relation of Pilkey with Ben. Johnson and Lockhart under this contract which he is claiming he was acting under, is material.

The COURT: Does this go to the question as to whether Pilkey had abandoned the contract?

COUNSEL FOR DEFENDANTS: It goes to the question of this agreement and the relations of Pilkey and Lockhart.

COUNSEL FOR PLAINTIFF: The only ground upon which statements of Johnson can be admitted is against interest, and as to those statements we do not interpose any objection.

273 The COURT: I understand it is not proposed by defendants that any statements given by Pilkey shall be made, but only Johnson's.

COUNSEL FOR PLAINTIFF: The time should be fixed.

The COURT: Fix the time.

Q. Do you remember about when this conversation took place?

A. Independently of other matters I do not, but from such investigation as I have made in my office with the attempt to refresh my recollection, I think it must have been in the month of October. I cannot tell whether it was 1893 or 1894. I could tell if I looked at my book, but I tried to fix that in my mind as to the year and month, and I have forgotten now. I could not state that without an opportunity of investigating further.

Q. When was that deed dated? (Exhibit 15.)

A. It bears date the 25th of March, 1894, and acknowledged the 30th day of January, 1896.

COUNSEL FOR PLAINTIFF: I take it that the execution of the paper itself and the delivery, as shown, to Lockhart at the time it bears date was sufficient to divest Ben. Johnson of the interest in the subject-matter of the suit, which alone would make his testimony admissible.

The COURT: Agreeing with that, but how does that come in? The question is whether this was October, 1893, or 1894; if it was 1894 I would rule it out.

COUNSEL FOR DEFENDANTS: Mr. Pilkey says it was 1894 that this conversation took place, and, of course, if we do not claim it was in 1893 there is no use for Mr. Field to look to see; but I maintain that deed did not divest Mr. Johnson of his interest in that mine if it is a mining claim, and a mining claim is said to be real estate and there can be no conveyance as a matter of law without
274 acknowledgment of the deed and delivery of the deed, and furthermore the deed had never been recorded. I do not recollect whether the court let it in or not; it went in subject to objection. If it is not a mining claim but a right to a piece of ground, and I think that is what it is, we say a deed conveying it certainly was not operative to convey any interest until acknowledged. Does the court rule out the question?

The COURT: I thought that ruling was going to be obviated. I rule out the question because I think it is a question whether it was in fact against interest or not, and if he had deeded away his interest, even though those interests had not been recorded, he had no interest.

Counsel for defendants excepts to the ruling of the court.

Cross examination of CHARLES PILKEY resumed:

Q. Wasn't this contract which you say you signed read over by yourself before you signed it, and did you not refer to Mrs. Ellen Lockhart to read portions of it to you, you were not able to decipher, or not?

A. No, sir; I never had spoken to Mrs. Lockhart up to that time, nor read it.

Q. You are in the habit of executing instruments in writing, are you, without reading them or knowing the contents of them?

A. Well, with all my partnership connection I never have much.

Q. Answer my question; are you in the habit of executing instruments without reading them or knowing their contents?

(Counsel for defendants objects, as witness has a right to explain, and the court instructs witness to answer yes or no and he can then explain.)

275 A. This is the first time I ever was on the stand in my life and I want to tell it straight and just the way the thing was.

Q. Don't you think a good way to do the straight thing is to answer the question?

A. The best I can——

The COURT: Answer yes or no, you can explain afterwards.

Q. Are you in the habit of executing written instruments that are prepared for your signature without reading them or knowing their contents?

A. As for that I could not say yes or no—I expect.

Q. You do not know whether you are in the habit of doing it or not?

A. No, sir; I could not say that I was.

Q. You have stated that after the execution of this contract you went up to the country where the mines in contemplation are situated, did you not?

A. Yes, sir.

Q. Will you describe the character of the country where this Sampson mine is situated to the jury?

A. It lies on a large hill up south of Peno cañon dipping into the hill.

Q. What is the general character of the surface of the country there as to being broken, hilly, wooded or rocky?

A. Broken, and it has some timber scattered over it. It has this ledge running through it, rocky in some places and some not.

Q. Was it inhabited at that time?

A. No, sir.

Q. You were one of the first men that discovered the mineral up there, were you not?

276 A. No, sir; I believe not, from what I saw there. The Iron King there, there had been some work done there.

Q. Was there any mining being carried on at the time you went up there in September, 1893?

A. No, sir.

Q. Anywhere in the vicinity?

A. Not that I know of.

Q. Were there any towns anywhere in the neighborhood, or settlements?

A. Not nearer than 7 or 8 miles.

Q. What settlement was that?

A. It was called La Canada.

Q. How many people, and what were their avocations in that settlement?

A. I should judge there were 8 or 10 or 12 families, more or less; it was a little placita.

Q. What was their occupation?

A. They farmed a little; some of them had cattle and some herded sheep.

Q. Were there any smelters or mills or any means for working ore or mineral anywhere in reach?

A. No, sir.

Q. Were there roads or means available for getting ore to where it could be reduced?

A. There was a very poor road that went up Peno cañon for a piece, I expect, three or four miles.

Q. Where did that run to?

A. The trail was from there on to now where Bland is and where the mines are.

Q. There was no mill, smelter, or other means of working minerals or ore at that time available?

A. No, sir.

Q. Up to what time did that state of things continue?

277 A. Until they commenced to build a mill at Allerton; that was the first.

Q. When was that?

A. Well, I could not say just what year.

Q. A year or two after you discovered this Sampson, wasn't it?

A. Yes, sir; between the time I discovered it and up to now. I do not just remember when they built the mill; I cannot say.

Q. What was your motive in locating, appropriating that lead called the Sampson?

A. Well, sir, to get mineral out of it, to get something out of it to live on.

Q. You could not eat the ore, could you?

A. Well, no, sir, I could not eat the ore.

Q. What would have been the purpose of taking the ore out of the lead if you had no means of utilizing it or working it?

A. Well, you could take it to some place and sell it or get some one to buy it.

Q. When the opportunity offered?

A. Yes, sir.

Q. Do you know what kind of mineral was contained in that lead?

A. No, sir, I do not. I never had any assay of it.

Q. When did you say you came down to Albuquerque after locating this lead on the 10th of July?

A. I came down a few days afterwards.

Q. What did you say?

A. I came to Albuquerque after I located the mine, I said.

Q. Did you or not take possession of that mine after you discovered it at the time you posted this notice?

A. Nothing more than to put up a few rocks and it was—I considered that was all that was necessary.

278 Q. You considered that was all that was necessary to take possession?

(Objection. Overruled. Exception on ground, question of law.)

Q. You considered by putting up this monument and posting that location notice and going upon the lead that you were taking possession of it, appropriating it?

A. Yes; I called it locating it; that is the way I looked at it.

Q. Is not that the way you took possession—isn't that the way you take possession of all kinds of lead claims?

Objection. Sustained.

Q. You did believe at the time that the mining laws of the United States and New Mexico applied to that country, did you not?

A. Well, I believed that was on Government land; is that what you mean?

Q. Yes; and so believing, with what purpose and what intention did you post this notice on this Sampson lead?

A. To locate it.

Q. What do you mean by "locating it"?

A. Well, just what I done is what I mean by locating it, putting the paper in some rocks I considered that it was mine, that it belonged to Lockhart and Johnson and I for 90 days under those conditions.

Q. On every discovery which you made what was your first act?

A. The same as I did on that, nearly the same.

Q. Did you ever come here to Albuquerque without seeing Levy Walker during that period?

Objection. Not cross-examination. Sustained.

Q. You stated, I believe, in the year 1893 you were never
279 in the house of Mrs. Stella Metz in this city, did you not?

A. I don't believe I ever was at all. Lee gave me a mineral glass and I went there for it; he was asleep and I rapped and no one came and I went around to the back door and asked for it and the lady gave it to me and I went off—not of my knowledge, I never was in her house at all.

Q. State to the jury with reference to that, were you at the house of Mrs. Metz, Mrs. Stella Metz, in the house during the year 1893, and if so at what times.

A. No, sir——

(Objection that time should be limited between July 10th and Oct. 23d, 1893; overruled, as witness stated he was not there in 1893 on direct examination.)

No, sir; not to my knowledge.

Q. Did you or not in the latter part of August or September, 1893, at the house of Mrs. Stella Metz, in the presence of Mrs. Metz, Frank Fagaly and Levy Walker, give some ore to those parties, or some of them, from this Sampson mine?

A. No, sir. I was working on the Ellen L. at that time, me and my wife.

Counsel for defendants objects upon the ground they did not go into this matter on direct examination and moves to strike out, and objection is sustained and the last answer of the witness is taken from the jury.

Q. Did you or not at that time and place, and in the presence of

those persons I have named, state that you would permit the location which you had made of this Sampson lode to lapse and——

(Interrupted by the court.)

The COURT: I have indicated that was not cross-examination.

COUNSEL FOR PLAINTIFF: As to the rule for discrediting a
280 witness, the foundation must be laid for it. I understand before the witness can be contradicted his attention must be called to the time, place and circumstances.

The COURT: Do you contend that you can lay such foundation if it has no relation to the direct examination?

COUNSEL FOR PLAINTIFF: Yes, sir; provided the subject-matter of the declaration is relevant to the issue in the case.

COUNSEL FOR DEFENDANTS: The court ruled it is not relevant.

COUNSEL FOR PLAINTIFF: That brings up the whole case as to the order of the introduction of the testimony, and our theory is it is relevant to the issue. The general purpose of the direct examination was to show there was an abandonment of this claim by plaintiff during the period in which the plaintiff was entitled to perform the necessary acts of location and for acquisition of the mining title, and that there was nothing done by him or by anybody else including the plaintiff in this case in respect to this claim during that interval; that was the general purpose and scope of the examination. Now upon cross-examination we wish to show exactly what the facts and circumstances were with reference to the use made of this claim and what was done by the parties in interest in regard to it, and in that sense it is directly relevant to the examination-in-chief; although independently of that we think we can lay the foundation for contradiction by asking questions that are relevant to the issue in the case, as to statements made by him.

COUNSEL FOR DEFENDANTS: This class of testimony the court has ruled out, and the gentleman wants to get it in independ-
281 ently of the proposition that excluded it, and should not be allowed to lay the foundation for impeachment about matters not interrogated in chief.

The COURT: I held that this sort of testimony — irrelevant to the issue as made by the plaintiff; irrelevant to the *prima facie* making of his case; now if you had put in anything in the way of showing you went there under color of semblance of right, then he could bring in this matter to show that you did not.

COUNSEL FOR DEFENDANTS: I think he could, but we have not done that.

The COURT: Of course if you do not bring in that matter he has no opportunity of bringing in this other matter by way of rebuttal, and I do not see that he has a right to force that as one issue in the case when you are not presenting it.

COUNSEL FOR PLAINTIFF: Is it not presented in this view? The effort of the defense is to prove absolute abandonment, and we prove therefore there was a prior appropriation and possession. The whole object of the testimony of this witness is to show absolute abandonment, and is it not relevant to ask him if he did not make a statement

that tended to show there was no abandonment, but other arrangements made that did not contemplate abandonment?

The COURT: If he had made arrangements to go off and abandon the claim, would that make it any the less an abandonment?

COUNSEL FOR PLAINTIFF: Yes, sir; as that would not be such an abandonment as the law permits to defeat prior possession on the part of the other two.

The COURT: I do not think you can compel the defendants to make a defense and put up something you wish to knock down.

282 COUNSEL FOR PLAINTIFF: He asked him what was done between the date of the location and October 23d and the witness said "Nothing," and the purpose of that is to establish abandonment of possession and abandonment. Upon cross-examination we want to show exactly the circumstances attending the possession of this claim, and if there was nothing done, why it was not done, and to show that the plaintiff Lockhart here was not a participant in any of the acts of this defendant knowingly.

The COURT: You can do that for your testimony.

COUNSEL FOR PLAINTIFF: I think so, probably, your honor, we might do it wholly independently of this impeaching or contradictory testimony.

The COURT: You cannot make it come in by laying the foundation of impeaching if it is not there anyhow. I think I should sustain the objection.

COUNSEL FOR PLAINTIFF: We do not want the objection made when we offer the testimony hereafter.

The COURT: I am not prepared to decide upon that yet; I see how there might be a distinction.

COUNSEL FOR PLAINTIFF: I would like to lay the foundation for it and ask leave to ask the question as laying the foundation for a specific contradiction in order to save the point.

The COURT: When that is laid this will be out of the way?

COUNSEL FOR PLAINTIFF: Yes, sir.

The COURT: I think I have to restrict the examination when you have brought this to the point where you make your record.

Q. Did you or not, in the latter part of August or in September, 1893, in the presence of Mrs. Stella Metz, at her house, and in the presence of Levy Walker and Frank Fagaly, state that you had completed the location of the Sampson mine for yourself,
283 Johnson and Lockhart, and that you would abandon that possession in favor of Walker and Fagaly?

(Objection; sustained; exception, to which ruling of the court the plaintiff then and there duly excepted.)

Q. Now there was a location notice posted upon this same property, was there not, on October 23d, 1893?

A. I was told there was. I never saw it with my own eyes.

Q. By whom and in whose name was that notice posted?

COUNSEL FOR DEFENDANTS: I object; we never asked about that.

COUNSEL FOR PLAINTIFF: It is preliminary and we expect to fol-

low it up by showing interest on the part of this witness in the subsequent location by defendants.

The COURT: You can ask him about his interest, as affecting the credibility of the testimony; that is the only thing that does not affect the credibility of the testimony, a present interest.

COUNSEL FOR PLAINTIFF: I do not see how we can show present interest at all unless we can show how it began, and the presumption it is continued until shown to the contrary.

The COURT: You can ask the direct question whether he has an interest.

COUNSEL FOR PLAINTIFF: I do not think the rule requires us—to be restricted to his answer, and we can show the circumstances to the jury.

The COURT: If he answers he is not interested you can go on and cross-examine him; that is, all that affects his testimony as to his interest.

284 COUNSEL FOR PLAINTIFF: I am stating what this question is preliminary to in regard to the location notice upon his claim.

The COURT: I sustain the objection, but as to the question as to his interest you can ask that.

Q. Did you have any interest in the Washington mining claim located by Walker, Fagaly, Johnson and Leeds on October 23d, 1893?

Objection; sustained.

COUNSEL FOR PLAINTIFF: Does your honor restrict the question to a present interest?

The COURT: Yes, sir.

COUNSEL FOR DEFENDANTS: I object because it is not cross-examination and on the ground that present interest in the suit is admitted.

Q. What is your present interest in this suit?

A. What is my present interest?

Q. Yes, sir; in this suit?

The COURT: How much interest have you got in the Washington claim?

A. I have none that I know of.

Q. You did have a fifth interest in the claim, did you not, as located by those four persons?

COUNSEL FOR DEFENDANTS: I object. Do you mean at the time the suit was brought?

The COURT: He says he has none now. He has a right to find out when he parted with it.

A. Not that I know of, sir.

Q. What do you mean by that answer, that you do not have any interest that you know of in the Washington location?

A. I mean that I would not have an interest with any man, with more than one man in any mine; you could not give me an interest in it now nor in any other claim.

285 Q. Well, you get interested in property without knowing it, and sign papers without knowing it—what do you mean by saying you do not know whether you had an interest in that Washington location or not?

COUNSEL FOR DEFENDANTS: I wish the plaintiff would fix the time.

The COURT: He said at the time of the location, and the witness fixed the time of the location himself, saying he understood it was the 23d of October.

COUNSEL FOR DEFENDANTS: I understood that was ruled out.

The COURT: There was no objection made to that, about the time of the location.

COUNSEL FOR DEFENDANTS: I object now to that question as to whether he had any interest in the mine at the time it was located, the time the Washington location was made.

The COURT: He has a right to cross-examine him.

Q. Please answer; it is a plain question.

A. I thought I had answered it.

Q. What was your answer?

A. That I had none.

Q. That you haven't any, or had?

A. Hadn't any.

Q. Never had any interest in that Washington mine?

A. No, sir; I never had nothing to show that I had an interest that I know of.

Q. You make a distinction, then, between never having had anything to show you had an interest, and the fact of your having an interest, do you?

A. No, I could of, I expect, had an interest if I had accepted it; I did not want it. I would not have, as I told you, any part of an interest in any mine after I had the trouble with Mr. Lock-

286 hart unless I was half owner.

Q. I am not asking you anything about any other mine than the Sampson mine; did you or not sell an interest in that mine to one L. B. Putney, and was not the deed for that interest made by Levy Walker?

A. No, sir.

Q. Then when it is stated that you were the owner of a fifth interest by Leeds, Walker, Fagaly and Johnson, it was not true, was it?

A. No, sir; it is not true that I had any interest.

Q. It is not true that you owned a fifth interest in that Washington location?

(No answer by witness to this last question, which is passed unnoticed, and the redirect examination immediately follows.)

On redirect examination he said:

Q. State to the jury whether you had any understanding with Lee Walker or anybody else that you were to receive anything for

any interest in that mine and if so when such understanding was had—that, or any other mine—with Lee Walker?

A. Lee Walker offered me an interest, as we had been friends, and I told him that I did not want to mix up with any hell-a-balloo; that I had had racket enough.

Q. When was this he did this?

A. Somewheres about the first of November, 1893.

Q. Did you have any such understanding with him, or did he make any such offer to you prior to the 23d day of October, 1893?

Objection, as leading.

Q. What understanding, if any, or what offer of that kind, if any, did you receive from Lee Walker prior to November first, 1893?

287 A. I never had no offer whatever.

Q. How about an understanding?

A. From him,—he never offered me anything until after I went to work for him.

Q. When did you go to work for him?

A. It was on the 28th of October, 1893.

Q. Why did you work for him; who did you work for at that time?

A. I worked for the Washington outfit.

Q. Who were they?

A. Lee Walker and Frank Fagaly, Johnson and Leeds.

Q. What did you receive for your work?

A. I was to get $2.00 a day.

Q. Did anybody pay you any of it?

A. Yes, sir; some of them.

Q. Who paid you?

A. Lee Walker paid me; Frank Fagaly paid me.

Q. Anybody else pay you any money?

A. No, I never got any more money.

Q. You stated on cross-examination that by putting this monument of stone up and posting that notice, that was the way you located a claim to hold it for 90 days; what else were you supposed to do, if anything, during the 90 days if you wanted to continue to hold it after that time?

COUNSEL FOR PLAINTIFF: I object to this witness testifying as to what law is applicable.

Overruled.

Q. What were you in the habit of doing if you wanted to hold a claim under the mining laws?

A. I had to have done the assessment-work, a ten-foot hole on the vein to hold it.

Q. Anything else?

A. I would have had to put out stakes on all the corners.

288 Q. Stakes, or monuments, which?

A. Yes, sir.

Q. What, if anything else, did you have to do with the location notice describing the claim, besides posting it on the claim?

A. Recording it.

COUNSEL FOR DEFENDANTS: There is a conversation I want to call forth from the witness in the nature of a re-examination and will reintroduce him for that purpose.

Witness reintroduced by counsel for defendants.

Q. That night that Lockhart was at the cabin with Detrick, at your cabin, state what conversation, if any, you had with him about some ore?

A. He came, him and Detrick, there, that was before dark, sundown.

Objection. Overruled.

Q. Go on and answer the question.

A. He said, "Have you any of that rock, ore you sent down like that which was wrapped up in red paper?" I said, "Yes, there is some of it here," and I got it and gave it to him, and he said, "That is the kind that looks like it," and we talked over it, and my wife was getting supper. He went in and laid on the bed; we had our bed in that corner (illustrating with his hands); he leaned back on the bed, and I said to him, "What did that rock run?"

Q. What rock do you refer to?

A. That I sent down rolled up in red paper I had taken from the Mammoth.

Q. What did he say?

A. He says, "It run $30.00 here at Albuquerque, but I sent some of the pulp to Denver and didn't get a trace." I felt then it wasn't very encouraging. Next morning before breakfast Mr. Lock-
289 hart and I went up to where I had done the work, a couple of hundred yards above the old cabin, and he says, "Primitive mode you have of working here; it is very slow; I do not feel like doing any more and I would rather quit it for the time being." I says, "I am willing to because I do not want to work on any rock or ledge that don't run, I count the same as nothing;" and we were looking down in the shaft at that time. We decided to quit work there on that claim there then.

Q. That was the Mammoth?

A. Yes, sir.

Q. Was this ore and this assay you refer to, was that the ore you afterwards had a disagreement with him about?

A. The same ore, sir.

Q. Did you find out whether Lockhart ever sent any of that pulp to Denver which he told you——

Objection, as incompetent and irrelevant, and counsel for defendants withdraws the question.

Upon recross-examination he said:

Q. When was it you had this disagreement you speak of with Mr. Lockhart?

A. It was on the 3rd or 4th or up to the 5th.
Q. Of October?
A. Of October. It was 2 or 3 days the disagreement. I went to have a settlement of my work on the Ellen L., and he wouldn't pay me and finally it got worse when I found out I had been deceived.

Upon re-examination by counsel for defendants he said:

Q. Did you have any conversation with Ben. Johnson at
290 the wool-house in the presence of Mr. Skinner about the 4th or 5th or 6th of October?
A. I did, sir.
Q. In regard to those mines up there?
A. Yes, sir.
Q. In 1893?
A. Yes, sir.
Q. State what that was?
A. I got the assay from the office.
Q. Whose office?
A. I went over to where Ben. was at the wool office.
Q. From whose office?
A. Harris'.
Q. He was the assayer?
A. Yes, sir.
Q. Now, go on?
A. I told Ben. I would not have nothing more to do with the crooked outfit; I said "If the mines were solid gold I would have nothing to do with;" I had had enough of it. He says,—I says "I will take you up there and show you where they are; you can have them; I do not want nothing, no more."
Q. What did Johnson say?
A. He asked me if I would not go and locate them in his brother's name.
Q. In whose name?
A. In his brother's name.
Q. In his brother's name alone?
A. He didn't mention any one else.
Q. Go on; what did you tell him?
A. I said "No, I won't locate them" and I used a word; I said I would not locate them in God Almighty's name. I said "If you will put some grub in the wagon I will take you up there and you
can locate them for yourself or any one you mind to, but
291 I don't want any, and you could not make me run fast enough to take an interest."
Q. Did Skinner take any part in the conversation you had there with Johnson?
A. Well, he was there and I believe he did have some say; I do not know——

COUNSEL FOR PLAINTIFF: I object to what Skinner may have said.

Q. What proposition did Skinner make to you and what did you say to them?

COUNSEL FOR PLAINTIFF: I object to any statement made by Skinner.

COUNSEL FOR DEFENDANTS: I propose to show, in the presence of Johnson, while Johnson was there——

The COURT: It seems to me if coming between Skinner and him it must be coming from Pilkey, Skinner simply putting it in form.

(The judge spoke so low or indistinct that the stenographer must have failed to catch all he said or misunderstood him, but the notes are transcribed such as they appear.)

COUNSEL FOR DEFENDANTS: I want to show Pilkey's reply to Skinner because it was notice to Johnson of the attitude of the witness.

COUNSEL FOR PLAINTIFF: I object upon the ground that it is incompetent and calculated to mislead the jury.

Objection overruled and to which ruling of the court counsel for plaintiff excepts.

Q. What if anything did Skinner propose to you?

A. He asked me if I did not want to go up and locate them; I said no I did not want any more partners; I will go a lone hand; I was out of humor and I expect I said more than I ought to.

Re-examined by couns. for plaintiff he said:

292 Q. When was that talk you are talking about with Skinner and Johnson?

A. That I believe was the 6th day of October.

Q. According to your understanding of the requirements of the law that was four days before the time was out for sinking the 10-foot hole and monumenting this Sampson claim, was it not?

A. Yes, sir.

Q. What claims were you talking about, more than one?

A. Any of them I hadn't done the work on. I told Ben. "Any of those claims that are located I will show you where they are; if you want to go and put the grub in my wagon I will take you; I do not want to have anything to do with that crooked outfit." That was my conversation with Ben.

Q. Had Fagaly prior to that conversation been with you on the Sampson location?

A. I did not know Fagaly at that time.

Q. You di-n't know Fagaly October 6th, 1893?

A. No, sir.

Q. When did you get acquainted with Fagaly?

A. It was some time afterwards.

Q. Had Walker been up there prior to that conversation?

A. No, sir.

Q. Had you brought or sent ore from that Sampson location to Walker prior to that location?

A. No, sir; I had never told, never given Walker any ore from

the Sampson mine but what I delivered to Mr. Lockhart or to any living being.

Q. There had been no sample obtained by the giving to Walker or Fagaly before October 6th, 1893?

A. No, sir; not by me.

293 Q. Had you made any arrangement or had any understanding with Walker or Fagaly prior to that time with reference to this Simpson mine?

A. No, sir.

Q. Now you say that when the Washington location was made you worked for that outfit at $2.00 per day?

A. I commenced on the 27th of October. Lee Walker told me I could have a job if I wanted it, and I had to do something to live; I had a wife, and I said I will go.

Q. You did state you went to work for them at $2.00 per day?

A. Yes, sir.

Q. Were you to pay any part of the expenses, location or assessments or other work on the Sampson mine?

A. No, sir; none whatever.

Q. The Washington mine, I should say?

A. No, sir.

Q. And you state that you had no interest whatever in it as a co-owner with the other 4?

A. No, sir; I would not accept as I told you.

Q. Well, what was the date of the conversation at the cabin with Mr. Lockhart you have referred to when this ore wrapped up in red paper was mentioned?

A. Well, it was the 18th or 19th or 20th of August; the night he got there; I cannot say just which night it was, but it was along there about the 20th.

Q. What was the work you were then engaged in doing at that time?

A. I was working on the Mammoth.

Q. On the Mammoth?

A. Yes, sir.

294 Q. Had the assessment-work on the location work, rather, been done at that time on that claim, the Mammoth?

A. Yes, sir, up to that date it had; I finished it about the last of June, the 20 feet I was to go and sink. It was more than the assessment-work.

Q. How far was the Sampson from the Mammoth, or from this cabin on the Mammoth in which you say you were living?

A. 1,000 or 1,200 yards; one thousand yards, along there; I never measured it.

Q. Were you not in charge of the different locations that you had made on behalf of yourself, Johnson and Lockhart?

A. At this time?

Q. Yes, sir.

A. Yes, sir.

Q. And for them and yourself?

A. In August?

Q. Yes, sir.

A. Yes, sir.

Q. Now, when had you sent the sample of ore from the Mammoth wrapped up in red paper that you referred to in your conversation to Mr. Lockhart?

A. It must have been some time about the first of August, because it was assayed on the 11th.

Q. How big a piece of ore was that?

A. It was (illustrating with his thumb and forefinger), why I know it was an inch and a half long and an inch wide. I had put it in the forge and heated it and put it in the water and two little spots of silver came out on the edge.

Q. Do you think it necessary to tell that in answer to my question?

A. One inch and a half long and an inch wide.

295 Q. That is the sample you were talking about to Mr. Lockhart at the cabin up there?

A. Yes, sir.

Q. Was that the same assay that was furnished to you by Mr. Harris upon the order you produced here the other day from Mr. Lockhart?

A. Yes, sir, I got that assay from that order; I have the assay if you wish to see it. (It is produced by witness.)

Q. That is from the Mammoth?

A. Yes, sir. There is all that Mr. Harris told me he had on his books that the order called for that came from that sample.

Q. What was the date of that conversation you mentioned with Ben. Johnson and Mr. Skinner at the wool-house?

A. It was the 6th day of October; it was the same day I got that assay on the order.

Q. 1893?

A. Yes, sir.

Q. Do you mean to say that Mr. Johnson in that conversation consented to your abandonment of this Sampson mine on his behalf?

A. Well, I understood it that way.

Q. What did he say about it?

A. He said he thought he would go up there and see them, he would see what he would do, but he never did.

Q. What did he say, tell the jury what he said. Didn't he say if you were mad with Lockhart was no reason why you should injure him?

A. He told me he was innocent of any charge or anything, and I said all right if you want to go there I will take you up, I didn't want anything more to do with you or Mr. Lockhart; I will

296 take and go up, but I am satisfied now I was not treated right; I ought to have known what those assays run before any one else in the town outside of himself and Lockhart; that I had went there and found it and gave it to them and worked, and to keep the assay of the rock from me and deceive me, to steal my

confidence in that way I would not have nothing more to do with them.

Q. Didn't he, Ben. Johnson, say to you in that conversation, if you were mad at Lockhart there was no reason for your injuring him?

The COURT (to witness): Answer if he said that in substance; about that or not.

A. Well, sir, that is what he said.

Q. Did you get any money from Ben. Johnson that day?

A. No, sir.

Q. Did you subsequently?

A. No, sir. I did in the spring afterwards, or the following spring, I think it was March, I am not sure but the receipt for it was dated and will show; if it was dated it will show; I do not just remember, but I think it was in the month of March.

Q. When did you get that $30.00?

A. That is the time I say I got it.

Q. That is the $30.00?

A. For the work on the Ellen L.

Q. March, what year?

A. 1894.

Q. Was that all the money you received from Ben. Johnson on account of those claims up there held by you three?

A. All that I got that I remember of; he gave my wife $5.00 to pay for a young steer we had bought from a Mexican.

297 Q. Did he tell her he gave her $5.00 to buy a yearling beef from somebody?

A. No, sir; the man was here; I bought it on time for $6.00; he was here at court I think and came over to the house for the money, and Ben. told me about it and he said he would pay it, and he came by there.

Q. Was that all the money he gave you in addition to that $30.00?

A. All that I remember of; if he ever gave any to me, any more, I have no recollection of it.

Q. How long would it take to go from Albuquerque at that time, the ordinary means of conveyance, to the Sampson location?

A. Well, you could take 2 or 3 days; I if you wished, horseback, one day and a half or two easily on horseback; I generally came down in one day.

Q. Did you or not get a letter from Mr. Lockhart dated Albuquerque, August 17th, 1893?

COUNSEL FOR DEFENDANTS: I object; we never asked about the letter.

COUNSEL FOR PLAINTIFF: He asked about the sample of ore in red paper and the conversation about it and if that is relevant to the issue I submit the correspondence in regard to it is also and we want to serve notice upon the gentlemen to produce the original letter and lay the foundation for secondary evidence in regard to it.

COUNSEL FOR DEFENDANTS: I withdraw my objection.

Q. August 17th it is dated?

A. Not that I know of, Judge.

Q. Do you mean that you may or may not have received a letter of that date?

298 A. I got several letters from him. I would not say that I did nor that I did not. I would not state certainly because I do not know.

Q. Did you keep Lockhart's letters?

A. Well, they were laying around the old cabin there; there was no secret about any of them and they laid there, some of them at the mine.

Q. Will you please look for such letter I have named dated August 17th, 1893, make search and see if you can find it?

A. If there is such a letter it is up there in the cabin, if it ain't gone. I have none here whatever.

COUNSEL FOR DEFENDANTS: Have you shown me all the letters you have got?

A. Yes, sir.

Q. I will ask you whether you did or did not in the early part of October in Albuquerque, state, in the presence of Mrs. Ellen Lockhart that all of the work required under the law had been done upon this Sampson mining claim?

COUNSEL FOR DEFENDANTS: I object because foundation as to time and place has not been sufficiently laid.

Q. What was the date of this quarrel you have testified about between you and Lockhart?

A. It was the 3rd, 4th, 5th or 6th—no, the 5th; I got the order for the assay on the 5th; I never spoke to him after that.

Q. On what day did it commence?

A. I think the third I went there and told him I would like to have some money for my work. He said "I never agreed to pay you."

Q. Now I will ask you whether or not on the 2nd of October, or the day before the quarrel you have referred to between you and Lockhart, you did not, in the office of Henry Lockhart, in

299 the building known as the Columbus hotel in Albuquerque, state to Mrs. Ellen Lockhart that all the work required by law to be done upon this Sampson claim had been done by you prior to that time?

A. No, sir; I never made any such a statement to Mrs. Lockhart, I never did.

On re-examination by counsel for plaintiff:

Q. I would like you to say which one of these assays you produce here, shown you, is the assay of that piece of ore that Mr. Lockhart told you ran $30.00 per ton?

A. This is it (referring to certificate) 23 ounces in silver and six ounces in gold. I got it on the 6th of October, but it was assayed on the 11th of August, was it not?

Counsel for defendants offers in evidence and the same is introduced certificate of assay above referred to, marked Exhibit 19, read to the jury, and which is as follows:

"EXHIBIT 19."

(Introduced in evidence.)

"Illinois mine assay office.

ALBUQUERQUE, N. M., *Oct. 6th*, 1893.

I hereby certify that the samples of ore assayed by me for Mr. Henry Lockhart for Mr. Pickley gave the following results:

No.	Description.	Silver ounces.	Gold ounces.
197.	Aug. 11th, '93.	23.00	6.00

WILLIAM HARRIS, *Assayer.*

Duplicate."

300 Mrs. ADA PILKEY.

Mrs. ADA PILKEY, witness for the defense, being sworn, testified as follows:

On direct examination she said:

Q. State your name.

A. Ada Pilkey.

Q. Is your husband Charles Pilkey?

A. Yes, sir.

Q. State if you were ever stopping with your husband on a mining claim known as the Mammoth, up in Cochiti.

A. Yes, sir.

Q. When did you go there with your husband?

A. When I went the first time I went the last of February, 1893.

Q. Where did you stop at that time?

A. At Canada la Cochiti, a little town about 8 miles above the pueblo of Cochiti.

Q. How long did you stay there with your husband?

A. About three or four days.

Q. From there where did you go?

A. My husband went the next morning, took a Mexican with him, up in the mountains or up in the Peno cañon, I do not know which.

Q. After you staid there about three days where did you and your husband come or go?

A. We came back to Albuquerque.

Q. When did you next go up there with your husband?

A. We went the next time about the first of May.

Q. How long did you stay then?

A. We staid until along the last of June.

301 Q. You say about the first of May,—can you fix the date any more accurate than that. Do you remember when your husband made a contract with Mr. Lockhart and Ben. John-

son—(COUNSEL FOR PLAINTIFF: If you were present.) Do you remember of your husband having made a contract?

A. Yes, sir.

Q. How soon after your husband told you the contract was made did you go?

A. The next morning after he said he had signed the contract that night.

Q. How long did you stay that time, you say until the latter part of June?

A. Yes, sir.

Q. Where did you stop that time?

A. We stopped on the Mammoth claim.

Q. In the cabin there on the claim?

A. Yes, sir.

Q. What did your husband do during that time?

A. He worked on the Mammoth.

Q. Did anybody help him?

A. Yes, sir; I helped him.

Q. What part of the work did you do?

A. Well, sir, I would hold the drill while he hit it with the hammer.

Q. You came back to Albuquerque in June then?

A. Yes, sir; we came back in June.

Q. How long did you stay here before returning?

A. We only staid a few days.

Q. Do you remember what time you got back up there?

A. Well, we went back the first of July; at least we were about Peno Blanco about the first of July.

Q. How long did you stay up there then?

A. We staid until the last of September.

Q. Do you remember what time you got to Albuquerque?

302 A. On the 3rd of October.

Q. While you were there on this last occasion do you remember anything about your husband locating a claim called the Sampson?

A. Yes, sir.

Q. Were you ever up there on the claim?

A. Yes, sir.

Q. State what your husband did on that claim?

A. He piled up a pile of rocks on the ledge and put the location paper on it.

Q. What other monuments or stake were put on it?

A. None whatever.

Q. What work, if any, was ever done on the claim?

A. None that I know of.

Q. Up to the time that you left there had any been done?

A. No, sir.

Q. Do you know Henry Lockhart?

A. Yes, sir, I have met him.

Q. Where did you meet him?

A. I first met him at Peno Blanco.

Q. When?
A. Along about the first of July.
Q. Did you ever see him up there after that time?
A. Yes, sir.
Q. At what time?
A. I saw him there on the 20th of August, the last time.
Q. Did you ever see him up there after that date?
A. No, sir.
Q. Was anybody with him when he was there on the 20th of August?
A. Yes, sir.
303 Q. Who?
A. Mr. Sam. Detrick.
Q. Where did they stop while there?
A. At the cabin with us.
Q. Do you know whether they went up on the Sampson claim while there?
A. I understood they did.
Q. How did you understand it?
A. When they came back to the house they had some rock that came of- the Sampson lode and they said it came off the Sampson lode Mr. Lockhart said it came off the Sampson lode.
Q. Did anybody give him the location notice or copy of the location notice of the Sampson?
A. Yes, sir.
Q. Who gave it to him?
A. My husband.
Q. Look at that and see if it is the location notice. (Exhibit 4, which was also afterwards marked again as Exhibit 16, but set out in record as Exhibit 4.)
A. Yes, sir.
Q. In whose handwriting is that?
A. Mine.
Q. When did you make it out?
A. On the 10th of July.
Q. How many copies did you make out?
A. 2.
Q. What became of the other copy, if you know?
A. It was put in the monument.
Q. Did you hear a conversation between your husband and Lockhart in regard to this Sampson location while he was there?
A. Nothing more than I heard him say that the rock was
304 too hard and close and he did not think it would carry mineral and I heard my husband say he thought it would, and I heard him say I do not go much on your judgment.
Q. Did Lockhart say that to your husband?
A. Yes, sir.
Q. What, if anything, did you hear him say about doing any work on the claim?
A. I never heard him say a word.
Q. How many times did you pass over, as well as you can re-

member, the Sampson lode between the 10th of July and the time you left there about the latter part of September?

A. We passed over it once and a while to hunt horses, but we never did it for anything else.

Q. Did you go over it yourself?

A. Yes, sir.

Q. Well, how many times do you suppose you went over it?

A. Well, we went over it probably four or five times during the time we were there.

Q. When did you next see Henry Lockhart after the 20th of August?

A. I saw him here last Tuesday in the court-room.

Q. Did you hear any conversation between your husband and Henry Lockhart wher there on the 20th of August in regard to the assay of a piece of ore that had been sent down in a red paper?

A. Yes, sir.

Q. State what you heard.

A. Why, he said it run 30 dollars at Albuquerque but that he sent the pulp to Denver and he didn't get a trace.

No cross-examination.

305 Adjournment until 1.30 p. m.

W. A. SKINNER.

W. A. SKINNER, witness for the defense, being sworn, testified as follows:

On direct examination he said:

Q. State your name, place of residence and business.

A. W. A. Skinner; Albuquerque; in the wool business here.

Q. Are you acquainted with Ben. Johnson?

A. Yes, sir.

Q. What was his business?

A. He is our warehouseman.

Q. Are you acquainted with Charles Pilkey?

A. I know him; yes, sir.

Q. Did you have any conversation with Charles Pilkey and Benjamin Johnson in Ben. Johnson's presence in the month of October, 1893?

A. Yes, sir.

Q. Do you remember about what time in the month it was?

A. About the 6th; somewhere about the 6th; I can't say exactly.

Q. State if anything was said in that conversation—what was said in regard to the mines, what are now called the Cochiti district, located by Pilkey in the name of himself and Henry Lockhart and Ben. Johnson.

A. About that time Mr. Pilkey was in there with some ore, and we were talking over these different prospects up there and looking at the ore, and there had been some talk previous to that of my

306 going in with the outfit, some time before that, and I broached the subject to Mr. Pilkey about taking an interest in it and going in and fixing up some difficulty he had had with Mr. Lockhart, and Mr. Pilkey said to me he didn't care——

The COURT: This was in the presence of Mr. Johnson?

A. He was present at the time; I do not know whether he was right at the truck at the time; we were near the press or scale where he was working.

Q. Did you say Mr. Johnson heard it?

COUNSEL FOR PLAINTIFF: I object unless Johnson heard it, unless it appears that Mr. Johnson was in hearing within the knowledge of the witness.

Q. Did Mr. Johnson take any part in the conversation?

A. Up to the time that I broached this subject to Mr. Pilkey Mr. Johnson took part in the general conversation; we were all talking about the mines. When I broached this subject to Mr. Pilkey about fixing this thing up Mr. Johnson stepped away, perhaps not over 10 or 15 feet, about his work there.

Q. Was he close enough to hear what was said?

A. If he chose to hear he could very well hear what I said to Mr. Pilkey and Mr. Pilkey's reply to me.

Q. Go on.

A. And I said to Mr. Pilkey,—I asked him how he would like for me to take an interest in the thing now, that would fix this thing up and see if I could not fix it up and go ahead. He had given me to understand he was entirely out of it.

Q. You will not say anything Pilkey said except in the presence of Johnson?

COUNSEL FOR PLAINTIFF: He is now stating something that Pilkey said to him previously.

The COURT: Are you?

307 A. No, at the time we were talking about these things he had talked in the general conversation that he had had trouble, at this same time, and I asked him if I could not go into it and fix the thing up and his reply was "no," he did — want any partners, he had had enough.

Q. What, if anything, did you hear him say to Johnson in regard to the mines up there, in regard to what he was going to do about it?

A. I do not recollect of his saying anything particularly to Johnson, any more than in the general conversation what they had done up there, particularly to Johnson.

Q. What, if anything, did he say he was going to do with reference to the mines up there?

A. He didn't say anything I can recollect that he was or was not going to do anything, particularly, with it, except he was done with that outfit, that he was not going to have anything more to do with that outfit, and I dropped the subject; I could not get anything from him.

On cross-examination he said:

Q. Was that about the 6th of October?

A. About that time; I do not know the exact date, but I think it was about the 6th of October.

Q. Do you remember Johnson saying in that conversation, when he was saying he was done with that outfit because he, Pilkey, was mad at Lockhart, was no reason he should injure him?

A. I do not think Johnson said anything of that kind in my presence at that time.

Q. How long did this conversation last?

A. I could not say; we were there—might have been there
308 10 minutes and might have been there for an hour; we were there some time examining the ore and he had a sack of samples he brought down, one full and another——

Q. What outfit was he speaking of?

A. Of Mr. Lockhart and I understand Mr. Johnson, too; he just said he didn't want any more partners, he had got through with one outfit and he didn't want any more.

Q. Did he say how he had got through with the outfit?

A. Yes, sir; he said that he had, as he expressed it, that Lockhart had lied to him once and damned if he got a chance to lie to him any more, as he expressed it.

Q. Who else was present?

A. The same persons present we had there all the time, Mr. Johnson, myself and Mr. Pilkey.

Q. Did Ben. Johnson in that conversation assent to Pilkey throwing that outfit over?

A. Not of my knowledge, no.

Q. This was just Pilkey talking?

A. Just Pilkey talking. He neither assented or dissented of my knowledge; I do not know that he expressed himself either way to my knowledge.

Q. Do you know anything of Ben. Johnson paying Pilkey any money that day?

A. No, sir.

Q. Was anything said about payment of money?

A. Not to me, not at that time. Mr. Johnson said to me afterwards he had paid him some money.

Q. The substance of it was that Pilkey was abusing Lockhart for some grievance he had against him?

A. That seemed to be the substance of his grievance, that
309 he didn't want any more partners with anybody because he had trouble with Lockhart.

Mrs. ADA PILKEY recalled by counsel for defendants:

Q. After you returned to Albuquerque on October 3rd with your husband, as you have stated, where did you remain from that time until the latter part of October?

A. We lived at the same place we are living at now.

Q. Here in Albuquerque?

A. Yes, sir.
Q. How long did you stay there?
A. I staid there until along about the 23rd of December.
Q. How long did your husband stay without going away?
A. Until the 28th of October.
Q. Where did he go on the 28th of October?
A. He came and told me he had a job to work at $2.00 a day.

Objection to what Pilkey told her; sustained.

Q. Did he go away?
A. Yes, sir.
Q. Where did he say he was going?
A. To the Cochiti district.
Q. You went away in December; where did you go?
A. I went to the Cochiti pueblo.
Q. Where was your husband when you got there?
A. He was at work.
Q. Where?
A. He was werking for Fagaly and his partners.
310 Q. At what place?
A. On the Washington.

No cross-examination.

W. C. HEACOCK.

W. C. HEACOCK, witness for the defence, being sworn, testified as follows:

On direct examination he said:

Q. What is your name?
A. W. C. Heacock.
Q. I see your name signed to a contract here (Exhibit I) as a witness; look at it.
A. Yes, sir, that is my signature.
Q. Were you present when the contract was signed by the parties to it?
A. No, sir, I was not present at the exact time the signatures were signed.
Q. Just state what you know about the signing of the contract.
A. I recollect certain circumstances surrounding it; Mr. Pilkey, Mr. Lockhart and myself were present, and if I am not very much mistaken Mr. Lockhart did sign his name while I was there; Pilkey's name had been signed previously; he said it was his signature. That was the first time I had ever known the man; I had seen him I guess.
Q. He acknowledged it was his signature?
A. He said he had signed it, yes, sir.
Q. Where was Ben. Johnson?
A. He wasn't there then, but my recollection is, it was a matter to which I paid very little attention at the time because I just hap-

pened into the office, that Ben. Johnson came into the office before I left.

Q. Was it read over by anybody there?

311 A. I never knew the contents of it at all; I was furnished with a copy of it in this suit; it was never read while I was present.

Q. Did any of the parties take it and read it in your presence?

A. No sir.

Q. What time of day was it when it was signed?

A. I have tried to fix that in my memory, but I cannot, but I believe it was about 10 o'clock in the morning from looking over matters I had with Mr. Lockhart then, business before Mr. Lockhart.

Q. Is there anything else you want to state in the case about it?

A. No, sir.

On cross-examination he said:

Q. At the time you came in the name of Charles Pilkey had been signed to that?

A. That is my recollection.

Q. The other two had not when you first came in?

A. No, sir—I want to state I am testifying to the very best of my recollection and the data I could gain from business I had at that time, and in trying to ascertain——

Q. Was the paper shown to Pilkey?

A. Well, now, I do not think it was while I was there.

Q. Didn't you ask him, before subscribing it as a witness, whether that was his signature, whether he executed it or not?

A. He admitted to me that he had signed that paper.

Q. You don't know whether it had been read by him or read over to him or not, do you?

312 A. Only so far as the time I was present I know it was not read.

Q. How long were you present on that occasion?

A. It would be an impossibility to tell; I had some business there that morning, but I could not say whether I staid 15 minutes or an hour; it would be impossible to state.

Q. How long did your connection with this occupy?

A. While I could write my signature there as a witness to that document; there was only us people present at the time. Mr. Pilkey, Lockhart and myself, according to my recollection; there might have been another person present; I do not say there was not.

Q. Do you know at what time, with reference to your coming there, Pilkey had signed his name to it?

A. I say my recollection was that when I was asked to certify to this as a witness that Mr. Pilkey's name had been signed, and that Mr. Lockhart did sign in my presence.

Q. And that Ben. Johnson came in while you were there? and you simply witnessed their three signatures, is that it?

A. I do not believe I ever saw Mr. Johnson sign this paper, but I believe he did come in before I had left that room; that is my dis-

tinct recollection of it; I do not think I saw Mr. Johnson sign; it is a long time ago and was a matter in which I had no interest whatever and I merely certified to those people who I did see sign this document. I know that I did not know how many people were to sign it and that I did not know the contents of the docu-
313 ment. All I know was that those people while I was present signed or acknowledged their names.

Q. Did you attest all three of the signatures?

A. I do not believe I did.

Q. What does the paper say?

A. The paper says Charles Pilkey, Henry Lockhart, and Ben. Johnson, and opposite the signature of Pilkey is signed, "Witness, W. C. Heacock."

Q. So that it is an attestation only of the signature of Charles Pilkey, yours?

A. Well, I would not like to say that is a fact, Judge. I know, and I recollect that portion of it; that is my recollection is this: That I did see Mr. Lockhart sign his name to that paper and I believe I intended to witness the signature of Charles Pilkey and perhaps Mr. Lockhart. I do not believe I ever saw Ben. Johnson sign that paper.

Q. Of course, you knew nothing that had preceded your attesting your signature?

A. No, sir.

Q. Or how long Pilkey had had the paper?

A. No, sir.

Q. Where did this occur; at what particular place?

A. You have got me; it was in Judge Lockhart's office; but whether it was upstairs in his insurance office or whether it was in the city building it would be impossible for me to state, or whether downstairs in that building where he had his office then. My recollection since has been that it was downstairs in the office where I think there is a tailor shop now; that is my recollection. I could not form an idea as to that merely from looking up my own business and own calendar.

Q. To refresh your recollection, was not Mr. Lockhart a justice of the peace at that time?

314 A. I believe he was.

Q. Wasn't your business there in connection with matters before that justice of the peace court?

A. That is true; I believe that is how I happened to be there; that is my belief.

Q. And where was that office kept at that time, the justice of the peace office?

A. Well, Judge Lockhart had three offices during his term as justice.

Q. Not three at one time, had he?

A. He always had two.

Q. At the same time?

A. Yes, sir, and sometimes he had three.

Q. Where did he hold his justice of the peace court?

A. Both offices; sometimes upstairs in the front end of the Hotel Columbus and sometimes downstairs in this room I described as a tailor shop now, or a saloon; I do not know which it was. It is my idea it was where the saloon is now situated, the second door from the stairway. I want to say if Judge Lockhart had a criminal case that it was generally held downstairs; if he had a civil case and it was an odd hour of the day, 3, 4, 5 or 6 o'clock in the afternoon, or in the evening, it would be heard upstairs in his insurance office.

Q. Your best recollection is that this witnessing of the signature was in the office downstairs?

A. That is just a passing recollection in my mind. It seems to me it was there. I may be entirely mistaken.

Q. What was there at that time adjoining this office downstairs?

A. Well, I could not state that; it seems to me there was
315 a tailor shop there or something of that kind; I do not recollect; perhaps Judge Lockhart had both of those rooms thrown into his office at the time. I recollect one thing, that a portion of the office, when it was downstairs with his insurance business, that his insurance business was done in that same office and his justice court was held in the back end of the office.

Q. But what adjoined it at that time, you do not remember?

A. No, sir, I do not.

Q. Do you remember who was present at the time you asked Pilkey if he had signed the paper and he said yes?

A. I know Judge Lockhart was there.

Q. And Pilkey and yourself.

A. Yes, sir, I was there and so was Mr. Pilkey; it was the first time I had ever known Mr. Pilkey.

J. Q. WILLS.

J. Q. WILLS, witness for the defense, being sworn, testified as follows:

On direct examination he said:

Q. State your name.

A. J. Q. Wills.

COUNSEL FOR PLAINTIFF: I would like to ask a preliminary question.

Examined on the *voir dire* by counsel for plaintiff:

Q. Do you believe in the solemnity of an oath?

A. Yes, sir.

Q. Is there any particular form of oath more binding upon your conscience than another?

A. I do not know that there is; I generally affirm.

Q. Do you believe in the existence of a God?

316 Objection; overruled; exception.

A. I neither affirm or deny it.

Q. If you neither believe nor disbelieve then you do not believe in the existence of a Supreme Being to whom you are answerable?

A. Well, I could not say as to that. I am answerable to the laws and mankind for anything I do.

Q. And that is as far as your responsibility extends, is it, your being answerable to man?

A. It is as far as I know.

Q. Well, you say you generally affirm?

A. Yes, sir.

Q. In what way?

A. I affirm to the truth whatever it might be.

Q. Well, what is the form of oath or affirmation that you regard as most binding upon your conscience?

A. I really consider when I affirm it is as much binding as anything I can do.

Q. Well, an oath with an uplifted hand, how do you regard that?

A. I regard that as a form; I do not know that it is any more.

Q. Well, the affirmation, is that a mere form too?

A. As I understand they are both forms, if I understand it rightly.

Q. On this occasion how was it administered to you, in the form of an oath or affirmation?

A. It was in the form of an oath. I generally say I affirm when an oath is put to me, and so I did in this instance; I answered that I affirmed.

Q. So that when you were asked "if you do solemnly swear" in this case you answered "I affirm"?

A. Yes, sir.

Q. You did not respond, I do, or yes.

317 A. I answered that I affirmed.

Q. Did you say that out loud?

COUNSEL FOR DEFENDANTS: I object, as it is too late for this kind of objection to be made by the plaintiff; it should have been made before the witness was put under oath.

By COUNSEL FOR PLAINTIFF: I move that the testimony of this witness be stricken out.

The COURT: The witness can affirm now in the form of the statute. (And same read to witness by the clerk of the court from the statute book.)

COUNSEL FOR PLAINTIFF: I wish to make a formal objection. From the statements of the witness himself it appears he is an unbeliever in the form of any kind of oath or affirmation except as a matter of form and that he is not answerable to a Supreme Being but only to man for his failure to speak the truth.

COUNSEL FOR DEFENDANTS: I object to the questions and answers of witness and move to strike them out.

The COURT: I will let them stay in, but will rule that the witness is competent to testify.

Counsel for plaintiff excepts to the ruling of the court in permitting witness to testify, upon the grounds stated, and counsel for

defendants also excepts to the ruling of the court in not sustaining his motion to strike out the questions and answers above on *voir dire* examination.

Direct examination of the witness resumed:

Q. What is your name?
A. J. Q. Wills.
Q. And place of residence?
A. Albuquerque, New Mexico.
Q. And business?
A. I suppose I am a miner, as much as anything.
318 Q. How long have you lived in Albuquerque?
A. 15 years in December last.
Q. Are you one of the defendants in this suit?
A. Yes, sir.
Q. State if you have ever been upon the ground called by the plaintiff in this case the Sampson and by defendants the Washington?
A. I have.
Q. When did you first go there?
A. I went there on the 20th of November, 1893, the first time.
Q. Who did you find there when you went there?
A. I found Mr. Fagaly, Frank Fagaly, Lee Walker, and Pilkey and some Indians. I think there were three Indians. I think the day I got there there were three, if I recollect right.
Q. What were Fagaly and Walker and Pilkey and these Indians doing there?
A. They were sorting ore and a sacking it.
Q. Was any work done on the mine then at that time?
A. Yes, sir.
Q. What?
A. There was a hole there, a shaft sunk 6 or 7 feet deep, I think about that.
Q. Where were they getting this ore they were sacking?
A. This ore came out of the shaft they had sunk there.
Q. Was the Washington location notice posted on the claim?
A. Yes, sir.

Objection, to leading witness.

Q. Where was it posted?
319 A. It was posted, as well as I remember, about 75 feet north of the shaft where they were sinking.
Q. How was it posted?
A. There was a stick squared up with some stones placed around it and on this stick was written the names of the locators.
Q. Was it the original location notice or the amended location notice that was posted there at that time?
A. It was the original location notice.
Q. Do you know where that is?
A. No, sir.

Q. Have you ever seen it since then?
A. No, sir, I have not; Mr. Fagaly took it out and showed it to me and put it back there in the stones in the monument.
Q. When were you up there last?
A. I do not think I remember the date now; it was some time in 1895, the spring of 1895.
Q. Have you ever seen the original since the amended location was posted?
A. No, sir; I have not.
Q. Do you know when and by whom the amended location notice was posted?
A. It was done by Mr. Fagaly.
Q. Were you there when it was done?
A. No, sir.
Q. Whose names were signed to this original location notice?

COUNSEL FOR PLAINTIFF: I object.
COUNSEL FOR DEFENDANTS: I have proved that we do not know what has become of it.

Q. Have you ever looked for it?
A. No, sir.
Q. Do you know whether it is on the claim now or not?
320 A. I do not.
Q. You do not know whether it is or not?
A. No, sir.

COUNSEL FOR DEFENDANTS: I think I can prove it is not on there or has been there for a long time since the amended location.
The COURT (to plaintiff's counsel): Do you object?
COUNSEL FOR PLAINTIFF: Yes, sir; it is very important for us to see the original location notice.

Q. Was it ever recorded if you know, the original location notice?
A. I do not think the original one was recorded, if I remember rightly.

The COURT: I will let it in, and it is understood that counsel for defendants shall produce all parties accessible and make them swear that it is not there on the claim or in their possession.
Counsel for plaintiff excepts to the ruling of the court.

Q. You have already answered the question that the original notice was posted?
A. It was in the stone; the stone was raised up and on the stone was another stone by which to hold it there.
Q. About how far from this shaft where they were taking out ore?
A. About 75 feet north of there.
Q. Whose name was signed to it?
A. Frank Fagaly, Lee Walker, Hub. Leeds and J. Johnson.
Q. What date did it bear?
A. I think the 23rd day of October. I am not positive it was that.

Q. What monuments, other monuments, if any, did you find on the claim, on the ground?

321 A. There were some small rocks piled by the side of a pine tree; it was not on the ledge; it was away from the ledge.

Q. How far from the ledge was it?

A. Well, I should think 15 or 20 feet.

Q. How many rocks were there?

A. Well, there were not many. They were small rock, and I think piled from 12 to 14 inches high—small rocks piled one on another up by the side of the tree.

Q. Did you discover any other monument except that one?

A. No, sir; that was all.

Q. To what extent did you examine the ground?

A. I will take that back—there was Mr. Fagaly's at the north end center of the Washington monument, up there on the Washington, and Mr. Fagaly and myself took a tape-line and measured the length of the Washington lode and put up the south end center, and I was over the claim there for 10 days, over it frequently; I do not know how often but several times and that is all I ever saw on the claim.

Q. What else was done while you were there?

A. We continued to work, while I was there, sorting ore.

Q. Where did you sleep?

A. We slept in the stone cabin.

Q. Who built that cabin, if you know?

A. Well, Mr. Fagaly told me he built it.

(Objection.)

Q. What did you have to do——

COUNSEL FOR PLAINTIFF: I move to strike out the answer of the witness (and same stricken as to American jurymen and had

322 not been interpreted by the interpreter into Spanish as to the Mexican jurymen).

Q. What did you have to do with the cabin; did you do anything?

A. I helped with Mr. Fagaly, Walker, Pilkey and some Indians to take the stone out of there to get some place to sleep while I was there.

Q. When was the cabin completed, if you know?

A. Well, it was completed when I left there.

Q. Go on and describe the cabin and what you did there, what was done while you were there with refereuce to that?

A. Describe the cabin?

Q. Yes; the size of it, how it was constructed, and what was done while you were there?

A. The cabin was about 12 by 14 feet, I would imagine, as near as I can guess at it. The west side of it was a ledge to the Washington mine that stood up very high. The south side of the cabin was stone broke up and built into a wall. The east side was by timber cut and split and set up on end, and the north end was upon

this high bank and they put logs across to hold the roof; this left those big bowlders down. The fireplace was built in the southwest corner, no chimney, but left open at top. We could pass around that side of the cabin to the fireplace and in one corner Mr. Walker was sleeping and Mr. Pilkey and Fagaly slept in the other corner. The Indians were there then and I had to sleep in this little narrow way that went around. I proposed we should make a room there for a sleeping-room and we did it, got drills and picks and pressed out those bowlders and broke them up to get them out of the door and we made room there so we could all sleep. We didn't take
323 all the stone out. Upon that north side they were there last spring when I was there; they were there still, but we prized them out and got room there so we could have some room to sleep.

Q. Have you ever been back there since?

A. Yes, sir, I was there last—I cannot say what time; it was last year I was back there; it was in the spring, though, it appears to me.

Q. Who was in possession of the mine then?

A. Mr. Fousall.

Q. As receiver?

A. Yes, sir. I found him there on the property.

Q. When did you first become acquainted with Charles Pilkey?

A. I first met him on the mine there on the 20th of November, 1893.

Q. You never met him before?

A. No, sir.

Q. Did you ever have any conversation with him prior to that time?

A. No, sir.

On cross-examination he said:

Q. You found Frank Fagaly and Charles Pilkey and three Indians, you say, there on this first visit?

A. Three Indians—I think it was three; I am not quite positive; I think there were 7 Indians when I left but I think it was three that I found there.

Q. Was Lee Walker there, too?

A. Yes, sir.

Q. You examined this claim for monuments, you say?

A. I do not believe I said I examined it for monuments. I was over it frequently.

Q. Did you make any examinations for monuments?

324 A. I was all over the claim and I think if there was any monuments there I would have found them.

Q. Were you searching for monuments?

A. No; I do not think I was. I was prospecting the ledge a good deal of the time with a pick.

Q. You didn't know this claim had belonged to somebody else, some time prior, did you?

COUNSEL FOR DEFENDANTS: I object on the ground that it is not cross-examination and immaterial.

Objection sustained; exception by counsel for plaintiff.

Q. Did you examine this pile of stones by the tree with the blaze on the south side?

A. No, sir; I can't say I examined it; I saw it there.

Q. Did you see any notice about there?

Counsel for defendants objects, except as to inquiry about Washington location notice; overruled; exception.

A. I did.

Q. What was it?

A. Mr. Frank Fagaly took the notice out of the pile of stone there and showed it to me.

Q. What was it, what was the notice?

A. It was a notice signed by Pilkey, Lockhart and Johnson, I think it was.

Q. Where is that notice?

A. I do not know where it is.

Q. Didn't you take it away?

A. Yes, sir; Mr. Fagaly gave it to me and told me to tear it up or take it away.

Q. And you did take it away?

A. I put in my pocket.

Q. Where is it now?

A. I do not know.

325 Q. Did you destroy it?

A. It has been some time ago. I could not tell where it is now.

Q. You have lost it then, have you?

A. I might say that I have not got it.

Q. What claim did it purport to locate; it would say, the name of the claim?

A. In the name of the Sampson.

Q. Did you tear the pile of stones down?

A. No, sir.

Q. Was that pine tree this was built up by blazed on which side?

A. I never saw any blaze.

Q. What theory were you proceeding on in going that day and taking off the location notice with reference to this prior location; was it upon the theory that it had expired by limitation, forfeited by the 90 days' limitation?

COUNSEL FOR DEFENDANTS: I object; it makes no difference what theory they proceeded on, but what were the facts.

The COURT: How do you maintain that is competent?

COUNSEL FOR DEFENDANTS: As descriptive of their possession. The defendants have undertaken to prove acts of possession and it comes out from this witness who was up there the 20th of November, examined what monuments he found there and found this Sampson

location notice essentially as it has been described and we hold this testimony is a part of the *res gestæ*.

The COURT: At that time I do not see what it has got to do with it. Objection sustained.

326 Q. I will ask you what was said between you and Mr. Fagaly about this location notice in the pile of rocks in addition to his telling you to take it away and tear it up?

Objection; overruled.

A. Well, Mr. Fagally called my attention to it, when it was located, and it was out.

Q. What?

A. Mr. Fagally called my attention to the location being out of date and it didn't amount to anything. Considerable time had elapsed.

Q. When you say out of date, do you mean the 90 days had expired?

A. 90 days had expired and I think he counted up to me 16 or 17 days afterwards, when his location was put there, so that it did not amount to anything, what became of it, whether it was torn up.

Q. Was Mr. Pilkey present when this conversation occurred between you and Fagaly?

A. No. sir; Mr. Fagaly and I were alone going over the property. Mr. Pilkey, I think, was working down at the mine at that time with the Indians.

Q. Was Mr. Pilkey there as owner or laborer?

A. He was there as laborer as I understood it.

Q. Did he have any interest in that property?

A. None that I know. He was reported to me as being there working at $2.00 a day, and I gave Mr. Pilkey some money there while I was there. I gave Fagaly money and he turned and handed Pilkey $20.00.

Q. To pay him?

A. On his wages; he says "Here is $20.00." A balance was left. I do not remember how much but there was still some coming to him.

Q. How many days had Pilkey been there?

A. I do not know.

Q. How long he had been working?

327 A. The amount, as I understood Mr. Fagaly, was due him; he claimed so much coming to him and I left $20.00, but I do not remember how much was coming to him.

Q. How long had Mr. Fagaly been there?

A. He must have been there, it appears to me, close to a month, about that time.

Q. Did you know Mr. Fagaly in Albuquerque?

A. Yes, sir.

Q. When did he leave Albuquerque to go up there?

A. The dates I could not tell, sir. It appears to me it was the latter part of October. I cannot tell the dates.

Q. It might have been the latter part of September, so far as you remember, then?

(Objection; overruled.)

A. It was in October, I know, because I was on the United States grand jury and it was in the latter part of October.

Q. I mean when Fagaly went?

A. Yes, sir.

Q. Was Fagaly on the grand jury?

A. I was, myself.

Q. Did you know where Fagaly was because you were on the grand jury?

A. I know when he left here; it was the time I was on the jury.

Q. Do you know when the grand jury began that year?

A. My recollection is it commenced very early in October that year; I was there for a good long sitting I know in October.

Q. And you remember simply that he left while you were on the grand jury?

328 A. After I had been on the grand jury for quite a while.

Q. Did you know before he left what business he was going on?

A. Yes, sir.

Q. Did you have any talk with him about it?

Counsel for defendants objects upon the ground that it is not proper cross-examination. Objection sustained.

Q. Can you tell how long you had been on the grand jury when he left?

A. Not the exact number of days, no, sir, I cannot.

Q. Who went with him when he left?

A. That I do not not know.

Q. Don't you know that Pilkey went with him?

A. No, sir.

Q. Did you see him when he was starting?

A. No, sir, I did not see him and I do not know that—I know—I might have seen Pilkey in town, but I do not remember seeing the man in town until I met him on the mine.

Q. Did Fagaly go by train or private conveyance?

A. He told me he went by wagon, afterwards.

Q. Had Fagaly ever been up there before he started on this trip?

COUNSEL FOR DEFENDANTS: I object upon the ground that it is not cross-examination and immaterial.

The COURT: I do not know what any of this has to do with the cross-examination.

COUNSEL FOR PLAINTIFF: He has stated that Fagaly left here in a wagon and I want to know if Fagaly had a guide or knew

325 where he was going and I want to find out where he found it and how he found it. Counsel for defendants asked him

generally to describe who he found there and the claim and with reference to this and it seems to me it is pertinent.

Objection sustained as not cross-examination.

Q. With reference to this house you say was built on the claim, the Washington, as you call it, wasn't that situated up against the lead?

A. Yes, sir.

Q. Had there not been an excavation out against the lead which was cropping up by which the ground was made level and that that lead was one of the walls of this stone hut?

A. There had not been any excavation. The lead was on the west side of the wall, but at the fireplace there was a big stone placed there to build the fireplace and that sat on this stone; there was no excavation there.

Q. Hadn't there been enough excavation there to make the ground level from the lead?

A. Yes, sir, it looked to me just about like they found it; some places there was a part level or about level and that is the appearance it had to me.

Q. How high was the top of that lead from the floor of the hut, next to it, wasn't it fully 10 fee-?

A. No, sir, I think probably it might have been 5 feet; there was a ridge pole across the stones and some stones piled out and at the end; on top of the ledge there was some stone piled on the edge of that ridge pole so as to raise and give it a fall each way.

Q. Did you go over that lead, 1,500 feet, from one end to another, from the north to the south end?

A. Yes, sir.

Q. Did you see any stakes on that lead with Pilkey's name on it?

330 A. I did not.

Q. Was Walker present when this notice was taken down, of the Sampson, or taken out and put by you in your pocket?

A. No, sir.

Q. How long had Walker been there when you got there?

A. He got there the day before I did.

Q. Fagaly had been there about a month?

A. My recollection is something about that time, maybe a little more, maybe a little less; it had been some time, I know.

Q. You gave Fagaly for Pilkey this $20.00 as your share of the work up to that time?

A. No, sir; Mr. Johnson, Mr. Leeds and myself were going to leave there on the morning of the first of December. They insisted on my coming down and getting tools; they didn't have tools enough there to work with—that I should come down and get tools and get them to them as soon as I could and come back myself.

Q. I am asking you about the $20.00 you gave him on the claim.

A. I am coming to that now, so as to make it clear. Mr. Fagaly asked me to leave some money with him, he would not have money enough. I asked him what he would need and he said $40.00

would do him until I got back, or for the present, or something of that kind. I handed him $40.00. Mr. Pilkey was standing by his side, and he just handed him $20.00 of the $40.00.

Q. Did you pay Pilkey anything after that, personally?

A. No, I think not.

331 Q. You didn't contribute anything towards paying Pilkey after that?

A. No, sir.

Q. You say that something was left due when this $20.00 was paid him?

A. That is what I understood; I do not remember the amount, but I remember Mr. Fagaly saying to Pilkey, "Here is $20.00, leaving so much due," but I do not recollect the amount.

Q. Do you know how much Pilkey has been paid in all for his services up there?

A. No, I do not know exactly. I did know at one time, it was somewheres in the neighborhood of $100.00.

Q. How long did he work there?

A. I do not remember the date now he commenced; I do not remember that. If my recollection is right we stopped work on the 17th of December, I think it was. I know Mr. Fagaly shipped his ore, got it down to Wallace and wrote to Mr. Leeds and I saw the letter, saying he had laid the men all off and was going to Denver with the ore. I think that was on the 17th of December if I remember rightly. Mr. Pilkey might have been discharged that day or a day or two before with the balance of them; I do not know about that.

Q. Did you learn that Pilkey had an interest in that claim at that time?

A. No, sir.

Q. When did you learn it, if ever?

A. It was talked, I do not know, somewheres, I think it was the Christmas afterwards that I first heard it reported around; I have heard it reported a great many times since.

Q. Don't you know today it is a fact?

332 Objection; not cross-examination; sustained.

Q. When did you say you went back the second time?

A. It was some time early in 1895, but I do not remember the date.

Q. In 1895? Were you not there in the year 1894 at all?

A. I would have to refer to something now to refresh my memory. I went there to have some work done on the mine but I cannot recall to memory when it was.

Q. Was Receiver Bonsall in charge at that time?

A. Yes, sir; and he wanted some place selected on the ledge to sink a shaft and I went up to do that, to assist him, but I do not remember the time.

On redirect examination he said:

Q. Look at that location notice and state if there was any monu-

ment on the claim corresponding to the monument referred to in that notice (Exhibit 4)?

Objection; as leading; sustained.

Q. State whether or not you examined—what, if anything, you found on the north end center of what would be the Washington or Sampson ground.

COUNSEL FOR PLAINTIFF: I object; that has been gone over and he has answered the question.

COUNSEL FOR DEFENDANTS: I will reintroduce the witness, if necessary.

Q. You spoke something about Mr. Leeds and J. A. Johnson going back on the first of December to Albuquerque; when did they go up there?

A. They got there on the 28th of November.

333 Q. How long had you been there when they came?

A. I got there on the 20th; I had been there 8 days.

Witness reintroduced by counsel for defendants.

Q. What did you find on the north end center of the ground called for on that location notice of the Sampson?

A. Well, there was a sappling there I suppose as large as that stove-pipe there (in court-room); it was cut off I suppose 5½ or 6 feet above the ground and then was squared down on the four sides.

Q. Was there any marks on it?

A. Yes, sir, the claim of the Washington mine running 1,500 feet south and the description.

Q. I will ask you about the Sampson monument called for by the Sampson, not the Washington?

A. That is all I found there. I would state to locate the corners 300 feet on the side, but we didn't put up monuments ourselves. Mr. Fagaly was to have that done afterwards.

Q. What did you find on what would be the northwest corner of the Sampson location as described in that notice?

A. I did not find any.

Q. Did you go to that place where it would have been?

A. Yes, sir, we run that tape-line 300 feet to see where our line corner and line would be.

Q. How about the other corner monuments, where they should have been on the Sampson, what did you find there?

A. We didn't find any.

331 Q. Did you go to those places?

A. Yes, sir.

On cross-examination he said:

Q. Do you know why those monuments were not put up on the Sampson, of the Sampson *of the Sampson* location?

A. I do not.

Q. Did you ever hear from Mr. Pilkey or Fagaly why?
A. No, sir.
Q. Or Walker?
A. No, sir.
Q. Did you ever talk with them about that?
A. I do not remember any conversation now.
Q. With reference to this original Washington location—I omitted to ask about that on former cross-examination—you say the original was signed by Frank Fagaly, Lee Walker, H. C. Leeds and J. Johnson?
A. Yes, sir.
Q. But that location notice was never recorded?
A. I do not think it was; I think the amended location notice was the one recorded.
Q. When and where was the amended location notice prepared?
Objection; as immaterial.
The COURT: For what purpose?
COUNSEL FOR PLAINTIFF: To show how much they changed the original one.
Objection overruled.

Q. When and where was the amended location notice written?
A. In Albuquerque.
335 Q. By whom?
A. Mr. Childers.
Q. When?
A. I think it was early in December, if I remember rightly; I cannot tell the dates. I know it was just after he came down, Mr. Fagaly came down, a few days, and I was anxious while there to get those monuments all up on the claim and I went to Mr. Childers and had him to write the locations and gave them to Mr. Fagaly a few days after he came down. I came down on the first of December and it was a few days afterwards I could not tell the dates exactly.
Q. Who was a witness to this amended location?
(Objection; question withdrawn.)

Who was a witness on the original location of the Washington which you say is lost?
A. I do not think that there were any witnesses, if I recollect right.
Q. In whose handwriting was it?
A. Mr. Fagaly's.
Q. Who signed it?
A. Mr. Fagaly signed all the names he told me; it was all signed in one handwriting; it was his handwriting; I knew it.
Q. Did Mr. Pilkey's name appear on that original location notice?
A. No, sir.
Q. Do you know who put the amended location up, actually put it on the ground?
A. I only know what Mr. Fagaly told me.

Q. Do you know who took down the original location notice?
A. No, sir.
Q. Do you know why it was taken down?
336 A. No, sir—I should imagine——
Q. We do not want what you imagine.

BENJAMIN JOHNSON.

BENJAMIN JOHNSON, witness for the defense, being sworn, testified as follows:

On direct examination he said:

Q. State your name?
A. Benjamin Johnson.
Q. Where do you live?
A. New Albuquerque.
Q. How long have you resided in Albuquerque?
A. I came down here with Gross & Blackwell; I forget what year that was in.
Q. Before that where did you reside?
A. Las Vegas.
Q. How long have you lived in the Territory?
A. I have been in the Territory since about 1879.
Q. Are you acquainted with Charles Pilkey and Henry Lockhart?
A. Yes, sir.
Q. Were you interested in a mining contract (Exhibit 1) with them in 1893?
A. Yes, sir.
Q. This contract? (Said exhibit.)
A. That is correct.
Q. Mr. Johnson, state if you had any conversation with Mr. Pilkey, Charles Pilkey, in regard to the mines located under that contract on or about the 6th day of October, 1893, here in Albuquerque?
A. He came down here about that time and was up there at the wool-house talking to me.
Q. State all that he said to you after he came here the 3rd of October, between that and the 10th of October; just give me
337 that conversation—first give that conversation at the wool-house?
A. The first thing he said to me—about the first thing—he wanted to know what those assays were that had been sent off. I told Pilkey one of them run about $120.00 in gold and (as near as I could recollect) 27 ounces in silver; the rest of them ran rather low; I do not know exactly what they were. He said Lockhart had been up there and he told him about the other assays and didn't say anything to him about that one, and it seemed from his conversation that he and Lockhart had some kind of falling out in regard to the thing, and he furthermore said he was not going to have anything more to do with Lockhart any further.

Q. What did he say about the claims up there?

A. I do not recollect that he said anything particularly about the claims.

Q. Didn't he say something to you about going up there?

A. Not that day; a day or two afterwards he came around and said if I wanted to go up he would go with me, and I told him I could not go then, I could not get away.

Q. Go ahead.

A. In the meantime he was speaking to me about going up the river to get some cattle to kill; he said he was going to butcher some cattle here.

Q. This first conversation—about what day of the month was that?

A. It was along about the first of the month; I think it was during the first week of court over here; I do not recollect when that was; the fall of '73.

Q. '93, you mean?

A. '93; yes, sir.

338 Q. Go on and give the whole conversation that you had with him. The last conversation, when was that, about what day of the month was that?

A. It was all at the same time, within two or three days; he went away in a day or two afterwards when I spoke to him and when he spoke about going for some cattle; I didn't see him after that for several weeks.

Q. Was anything said about relocating the claims?

A. I believe he said something about going up there and doing something, and I mentioned to him of putting my brother's name in the place of Lockhart if he didn't want to do anything with him; I think that was one remark.

Q. What did he say about that?

A. I do not recollect what he did say about it.

Q. Didn't he tell you he would not have anything to do with them, but you could go up there and locate them if you wanted to; that he would take you up there? (Objection: Leading. Sustained.) What did he say about his not wanting anything more to do with the claims?

A. All he said to me about not having anything to do was with Lockhart because he had deceived him on that one assay and hadn't told him anything.

Q. What did he say about taking you up there?

A. He said if I wanted to go up he would go with me.

Q. For what purpose were you to go up?

A. For the purpose of seeing what he had up there.

Q. What did he say about provisions?

A. I do not recollect his saying anything about provisions.

339 Q. How were you to go and how did you propose to go?

A. Well, I inferred from the way he talked he would drive up with his own teams. If we needed any provisions would have to take them along—suppose we would.

Q. Did you ever tell Lockhart what he said to you?

A. I told him several times.
Q. At what time did you tell him then?
A. I did shortly afterwards.
Q. How soon afterwards?
A. It could not have been more than a day or two, I do not think.
Q. What was your understanding at that time as to how many claims Pilkey had done work on up there?

(Objection as leading.)
The COURT: Ask him what he said.

A. The first claim he worked on was—the first one he worked on was the Mammoth, I think it is; he done some work and took a contract to do 20 feet more and went to work on the Ellen L., and got into the lead and then came down here and that is the time he and Lockhart came down here.
Q. He claimed pay for work on the Ellen L. at that time, didn't he?
A. He claimed pay for more work he had done for assessment. Later on towards spring I paid him $30.00, I think it was.
Q. What claim did he make for work on the Washington, on the Sampson?
A. He didn't tell me anything about that.
Q. What understanding did you have from what you
340 heard from either Pilkey or Lockhart as to whether any work had been done on the Sampson at that time?
A. None that I know of.
Q. You mean you did not have any understanding?
A. I never understood there was any work done on it.
Q. You talked with Lockhart frequently about the business, didn't you?
A. We seen each other every couple of days. I never was up there. I never seen any claims until June the next year, 1894.
Q. Lockhart had been up there?
A. He had been up there several times.
Q. Do you remember when was the last time before this he went up there?
A. The last time he went up there before Mr. Pilkey came down?
Q. Yes, sir.
A. In October?
Q. Yes, sir.
A. It must have been a month or such matter, probably a little more.
Q. After the Washington was located did you have any conversation with Lockhart as to whether you wanted to make any claim for the ground?
A. We spoke about it.
Q. What did you tell him?
A. The first conversation that was had I think was on the corner of the street down there near the office, he spoke of it; he said he

had had the location recorded, and that is about all there was said at that time.

Q. Was anything said before that as to why he had not recorded the location?

341 A. I never asked him anything about it; he was doing that part of the business, looking after it and having those things attended to and I never asked him any questions about that.

Q. What did you ever tell him as to whether you wanted to make any claim for that ground, bring any suit for it; what was your final conclusion; what did you tell him?

A. I told him I did not want to enter into any lawsuit; if he wanted to he could go into it himself.

Q. And you made this deed to him on that account?

A. Yes, sir.

Q. When was that deed delivered?

A. It was delivered some time——

Q. It bears date the 25th of March, 1894?

A. It was early in the spring; I was up there at Bland and he sent the deed up there from here and I sent it back to him.

Q. When was it acknowledged?

Objection; deed shows for itself.

A. It was acknowledged later on.

Q. It recites a consideration of $5.00 (said deed referred to being Exhibit 15 heretofore introduced) did he ever pay you that $5.00?

Objection; immaterial; and under seal reciting consideration; sustained.

Q. Did I understand you to say you were not up at Bland until June, 1894?

A. I was there for a couple of months but I went to the Washington hole.

Q. You were up there when you signed that deed?

342 A. I signed that at Crown Point. I went over on the Washington hole in the month of June. Jim May and I went over on Sunday.

Q. Did you acknowledge that deed on the 3rd of January, 1894, before S. J. Gillett?

A. I acknowledged it here in Albuquerque.

Q. How much money in all did you ever pay Pilkey, leaving out this $30.00 which you paid him in March, 1894?

A. During the time he was working up there I recollect of paying him a couple of dollars to get some work done at the blacksmith shop; I do not recollect whether I paid him anything personally or what I did pay him; whatever I paid him I made an account of it to Lockhart and he was keeping the accounts, and after he and Lockhart fell out about that assay he came up there one day and wanted $10.00 and I told him I did not have the money but would get it and give it to him, and he met me on the street between the White Elephant saloon and Phelan's drug store and I gave him $5.00 and he said he was going up the river at the

time for some cattle, and I told him I would take the other $5.00 over to his wife on Sunday, which I did; and the next spring following I paid him $30.00 for the work he had done on the Ellen L.

Q. These contracts for doing work on these claims were separate contracts made for each claim?

A. This 20-feet work done on the first was a contract, the other was not.

Q. This Mammoth was the first one?

A. Yes, sir.

Q. Then the Ellen L.—what claim did Pilkey make that he was entitled to separate pay for work done on that?

343 A. He claimed pay for two-thirds of the work over and above the assessment; that is the way I understood it.

On cross-examination he said:

Q. With reference to this deed, Mr. Johnson, was it understood you were conveying your interest to Mr. Lockhart finally, or you were still to have a half interest of what he recovered in the suit?

A. The understanding was when I gave the deed if he made anything out of it he was to give me my portion of it.

Q. And wasn't one of the reasons why you didn't want to go into a lawsuit religious scruples, on account of your religion?

A. That was one thing, and there was other things connected with it, too.

Q. When Pilkey came up and you had a talk with him, he came the same day that he had the quarrel with Lockhart, didn't he?

A. I ain't certain about that. I do not recollect whether Pilkey told me he had just come up from Lockhart's or was going down there.

Q. But when he came back he told you he wanted the order for the assay?

A. Yes, sir; I gave him one.

Q. Was that day after the quarrel or before?

A. That was a day or two later on when he spoke to me of the assays in the first place: I do not think it was the same day.

Q. And on your order for the assays he could not get the certificates?

A. That is what Mr. Pilkey told me.

Q. Then did he go back to Lockhart and get an order from him for it?

A. That was my understanding of it; yes, sir.

344 Q. Now, before he went back he had asked you for money on general account for work up there under this contract, before he went back to Lockhart?

A. When he asked me for money he said he had bought a little yearling up there and wanted to pay for it; he owed the man for the animal, and the man was down here attending court and he wanted to pay him for it. I didn't ask him the price of the animal, but he asked me for $10.00.

Q. He claimed to have used this animal in his work on that contract, this beef?

A. Of course, I suppose it was intended for that.

Q. How did you intend it when you paid it?

A. I supposed he was going to pay the man for the steer he got.

Q. That is, you intended it to apply under the contract as part of the pay that was coming to him under the original contract he was prospecting?

A. We were under contract to furnish him that grub.

Q. And you looked at it as furnishing part of the grub under the contract?

A. I looked at it as paying him money for the beef.

Q. You gave him $5.00?

A. Yes, sir.

Q. Did you report that to Lockhart under the joint account?

A. Yes, sir.

Q. Lockhart kept all the books and you reported when you gave Pilkey anything?

A. Yes, sir.

Q. You were responsible for half of the tools, provisions and assays and all of that kind that Lockhart kept account of?

345 A. He kept all accounts of everything.

Q. You paid, or assumed half of it, didn't you?

A. I paid for half of it as it went along, very close to it.

Q. Do you remember looking at the book, how much it amounted to, you paid half of under this contract?

A. As near as I can recollect he paid for his provision account and it was in the neighborhood of $50.00.

Q. You only furnished very few items you reported to him in the way of cash given to Pilkey, as I understand it. Do you know anything about this account, the Cochiti Mining Company?

A. I do not know a great deal about it; whenever there was an order sent down here it was filled and sent back to him; I think I bought two or three of them myself.

Q. Do you remember how much the whole partnership costs the firm, you and Lockhart, this whole prospecting arrangement?

A. I think I got in the neighborhood of $150 from my brother and put in the neighborhood of $100 myself.

Q. That would make more than $200 at any rate, wouldn't it?

A. I do not recollect exactly what the actual expense account was. The last check I gave Lockhart was when he went up there to do a little work, to take out some ore; I think it was a $75 check I gave him.

Q. I mean this Pilkey contract?

A. I could not testify as to the exact amount of it. I do not recollect.

346 Q. You have no reason to doubt Mr. Lockhart's account is correct, which he kept? (Objection.) When you gave Mr. Pilkey this $5.00 after he quarreled with Lockhart, what arrangement if any as to any more money you were to furnish?

A. I told him I would take the other $5.00 over and give it to his wife; he was going away.
Q. He was going away?
A. Yes, sir.
Q. Did you take it and give it to his wife?
A. Yes, sir.
Q. When?
A. I gave it to her on Sunday.
Q. The Sunday succeeding this quarrel?
A. Yes, sir.
Q. He was gone at that time?
A. Yes, sir.
Q. Where was he gone?
(Objection; overruled.)
A. I did not see him go away; I heard he had gone away.

Counsel for defendants asks to have witness' answer stricken out.

Q. Pilkey himself told you he was going away himself?
A. Yes, sir.

The court instructs the jury that previous answer to last one of witness is stricken out and not for their consideration.

Q. Did his wife tell you where he was going when you went to see her?

Objection; sustained.

Q. Why did Pilkey ask you to take it to his wife?
A. He didn't ask me; he said this Mexican was stopping in town, attending court and he owed him for the animal and I took the balance of the $10 to her so she could pay him.
347 Q. Why take it to her?
A. There was nobody else to give it to.
Q. Why was there nobody else to give it to?
A. I told Mr. Pilkey I would take it over and give it to his wife.
Q. Why did you tell him you would take it and give it to his wife instead of giving it to him, Pilkey?
A. I only had $5.00; I could not very well give him $10.00 at the time.
Q. You gave him that $5.00 during the week as I understand?
A. Yes, sir.
Q. When you did get the other $5.00 why didn't you give it to Pilkey?
A. He wasn't here.
Q. Did you know at the time you gave him the first $5.00 that he was going away; did he tell you he was going away?
A. Yes, sir; he told me he was going up the river before I gave it to him.
Q. When Mr. Pilkey came to you first after he had had a quarrel

with Lockhart, did you tell him you didn't think he ought to break with you because of any difficulty or quarrel with Lockhart; did you say that to him?

A. I do not recollect what I did say to him.

Q. Did you try to pacify him; quiet him?

A. When he had that quarrel with Lockhart I paid him that money principally to keep on good terms with him.

Q. Did he accept it on the same principle from you?

Objection; sustained. The court remarking that the witness can state anything that was said at the time.

348 A. He took it willingly, that is all I know about it.

Q. On that account?

A. On account of what he had been doing up there.

Q. Did you or not say anything to him to this effect, "that he ought not to forsake your interests on account of a quarrel with Lockhart," that, or anything to that effect?

A. He did make a remark similar to that one time to me; I do not remember just when it was; he said he had nothing against me and only animosity against Lockhart.

Q. Now, he went around afterwards to see Lockhart and get the assays, get an order on Mr. Harris for the assays, didn't he?

A. Well, after I had given the order to Mr. Harris to get the Harris assay.

Q. And he had failed to get it?

A. And he refused to give it to him and he went down and got one from Mr. Lockhart, so I understood it.

Q. That was on the day subsequent to the time he had the quarrel, was it not?

A. It was shortly afterwards he and Lockhart had a few words; I think he asked Lockhart for some money and he refused to give it.

Q. That was the first quarrel?

A. Yes, sir.

Q. Now, did you or not, Mr. Johnson, at that time abandon the Sampson and these other claims at the time of this conversation with Mr. Pilkey?

Objection by counsel for defendants, as question is improper, and the question of abandonment for the court or jury.

349 Q. Was anything said about your abandoning these claims in that conversation with Pilkey?

A. There never was anything said between us in regard to abandonment, anything at all that I recollect of.

Q. With reference to this assay that Pilkey was complaining about, why wasn't it, or why was it, that Lockhart didn't give it to him, do you know—one of the partners?

A. No, sir.

Q. Or tell him the result of it?

A. How is that?

Q. Do you know why Lockhart did not give him the result of that assay he complained of, and which made him mad?

A. I suppose he told him about the assays when he went up there. I was of that opinion.

On redirect examination he said:

Q. State if that was the assay that the trouble was about. (Exhibit 19.)

A. That is the assay he had referred to, but it was my impression it was a little more in silver than this is; it don't make any difference.

Q. Do you know whether Lockhart had sent any of the pulp of that assay to Denver to get it assayed there?

A. He had sent some pulp up there of several assays Harris had *been* made.

Q. Do you know whether he sent that one or not?

A. I never seen him send any, only what he told me.

Q. Did he tell you anything about ever having sent this
350 one and getting a return from it or report from this one? (Exhibit 19, which is shown to witness.)

A. I do not recollect. He was getting assays every day, then, or two and I cannot recollect.

Q. Well, you state that one of your reasons for not wanting to bring this suit was religious scruples on the subject and there were other reasons. Have you any objections to stating what those other reasons were?

A. I explained that in your office some time ago.

Q. I have forgotten it, but I shall not insist on your stating them unless you want to.

A. I don't think it would cut any figure in the case anyway.

Q. He told you, you say,—Pilkey told you he was going up there, up the river to buy some cattle?

A. Yes, sir.

Q. Do you know as a matter of fact whether he went or not?

A. Shortly after that Fagaly came back——

Q. I do not want you to tell me anything about that, or what anybody told you.

COUNSEL FOR PLAINTIFF: I insist he can tell what Fagaly told him; that it is responsive to the question.

COUNSEL FOR DEFENDANTS: I asked him of his own knowledge.

Objection sustained in favor of defendants.

Q. You stated you paid this $10.00 to Pilkey; Pilkey was claiming it was due him, was he not?

A. Yes, sir.

Q. And also the $30.00 which you paid in March, 1894; Pilkey claimed that as due him for work that had been done.

351 A. That is what I paid it to him for.

Q. Prior to the time he had this difficulty with Lockhart about the assay, for work he had done, the work which he claimed

pay for was prior to the time he had the difficulty about the assay?

A. Yes, sir.

On recross-examination he said:

Q. Mr. Johnson, the work he claimed pay for was work on the Ellen L, which you paid him, subsequently on March 30th, for?

A. Yes, sir.

Q. And this $10.00 was extra in addition to that, generally, on account of this work up there?

A. Yes, sir.

Q. When you said there were other reasons why you made this deed besides religious scruples—this deed to Lockhart of your interest in the Sampson—did you or not mean that one of those reasons was because you abandoned this claim?

A. I never abandoned anything I had an interest in.

Q. That was not the reason of the declaration to go, or rather not go into a lawsuit?

A. No, sir, it was no consideration at all; I never thought about anything of the kind.

Q. Did you have a talk with Mr. Fagaly subsequently to the time that Pilkey said he was going up the river—don't tell what it was?

Objection, not cross-examination. Objection sustained.

Re-examination by counsel for defendants:

352 Q. After the 6th of October, did you understand, ever understand Pilkey as doing any more work——

Counsel for plaintiff objects to what the witness may have understood, and furthermore objects unless counsel is more specific in his question.

Q. What do you know—what work did you pay for—was there any other work to be paid for?

A. I paid him $30.00 for work he done on the Ellen L. and took his receipt for it.

Q. Do you and Lockhart owe him anything now?

A. I do not owe him a cent that I know of.

Q. Well, you and Lockhart never understood he did any work after the 6th of October?

Counsel for plaintiff renews former objection, unless question is more specific as to what particular time, etc.

Q. When you paid the $10.00 what did you understand as to Pilkey doing any work after he came down here early in October—(objection.) Whenever you paid it.

The COURT: That would not apply to after the 6th.

Q. Did you ever understand that he did any work after you paid him the first $5.00?

Objection unless he said how he understood it, from whom?
COUNSEL FOR DEFENDANTS: From Pilkey.
COUNSEL FOR PLAINTIFF: I object; he does not specify when.
The COURT: At that time; the time he paid the $5.00—from Pilkey.

A. Well, I paid him that money after he had the trouble with Lockhart and I do not think he done any work up there after that.

Re-examined by counsel for plaintiff:

353 Q. That is, he did not do any work for you and Lockhart after that time?
A. Not that I know of; no, sir.

H. C. LEEDS.

H. C. LEEDS, witness for the defense, being sworn, testified as follows:
On direct examination he said:

Q. What is your name?
A. H. C. Leeds.
Q. Where do you reside?
A. Albuquerque, Bernalillo county, New Mexico.
Q. How long have you lived there?
A. Off and on for 15 or 16 years.
Q. Are you one of the defendants in this case?
A. Yes, sir.
Q. When did you ever go on the ground called the Sampson by the plaintiff and the Washington by the defendants in this case?
A. The last of November, 1893.
Q. Have you ever been there?
A. Yes, sir.
Q. When was the first time you went there?
A. The last of November, 1893.
Q. State who you found there when you got there?
A. I found Frank Fagaly, Lee Walker, Charles Pilkey, 3 or 4 Indians and Colonel Wills.
Q. Do you know how long Colonel Wills had been there?
A. A week or 10 days before we went there.
Q. Who went with you?
A. Johnson; J. A. Johnson.
Q. How long did you and he stay there?
A. About three days.
354 Q. What did you see on that claim in the way of any work done?
A. There was a shaft sunk 7 or 8 feet, a cabin, a small cabin, built there.
Q. Was anybody working in the shaft while you were there?
A. Well, they were breaking and sorting ore when I staid there; they had plenty on the dump.

Q. Who was doing this?

A. Fagaly and all hands that were there.

Q. Describe that cabin.

A. Well, the cabin was built on the north side on the ledge, which is pitched down that way (illustrating with his hands) and this side built up and on the lower side it was rock which came out of the ledge, and it was covered; it was a dirt roof, split timbers; it was what I would call logging on the roof and dirt on top of it, split logs.

Q. How was it inside?

A. The rock on the north side sloped down that way (illustrating downward with his hands) and they had pried them out so we could sleep there.

Q. Where did you sleep?

A. We slept in that cabin.

Q. Did anybody state to you who built that cabin while you were there?

A. Why, they told me they built it, the boys that were there, that belonged there, Walker and Fagaly, whoever was there to work, that is what I understood there.

Q. Did you go over the claim?

A. Yes, sir.

Q. What other place, if any, did you find where any work had been done except this shaft where they had taken out the ore

355 A. I found nothing done on the claim except the monuments, center monument and end monuments.

Q. On what claim did these monuments belong to?

A. On the Washington.

Q. What monument, if any, did you find that belonged to the Sampson?

A. I never saw any.

Q. Did you go where—if they had been there—you could have seen them?

A. I should if there had been anything there to amount to anything.

Q. When did you next go back there?

A. The latter part of December.

Q. The same year?

A. Yes, sir, 1893.

Q. At the time you were up there, was the original location notice of the Washington posted, the first location notice?

A. Yes, sir.

Q. Do you know what has become of that notice?

A. No, sir; I do not.

Q. Do you remember whose name was signed to the notice?

A. Fagaly and Walker and Johnson and myself.

Q. What was the date of it?

A. It was located on the 23rd of October.

COUNSEL FOR PLAINTIFF: I wish to be understood as objecting to this and the other on the ground we would like to see the original notice.

The COURT: I understand he is going into it on the ground he could not find it.

COUNSEL FOR PLAINTIFF: He must first lay the foundation.

COURT: You had better lay the foundation.

356 COUNSEL FOR PLAINTIFF: We object to this testimony as to the contents of this original Washington location notice on the ground that the foundation has not been laid for the introduction of the contents of a lost instrument, and move to strike out the testimony on that ground.

The court overrules objection and counsel for plaintiff excepts.

Q. When you went back in December what did you do?
A. Went over the claim to see it was properly staked.
Q. What time in December?
A. From the 25th to the 28th.
Q. Do you know when the amended location notice was posted?
A. 16th of December, I think.
Q. Were you there when it was posted?
A. No, sir.
Q. Was it up when you got there on the 25th?
A. Yes, sir.
Q. You say you went there to see that the claim was properly monumented, what did you do in regard to that?
A. I saw that the monuments were up, center and each end and the stakes.
Q. Stakes where?
A. On each end.
Q. Were the corner stakes put up?
A. Yes, sir.

On cross-examination he said:

Q. How long had Fagaly been up there when you got there?
357 A. I do not know; I think Fagaly went there about the 17th or 18th of October.
Q. Do you know when he went there?
A. I would not swear positively when he went there.
Q. Do you know that he went there earlier than the middle of October?
A. No, sir.
Q. Did you know when he went there as a matter of fact—were you in Albuquerque when he left to go there?
A. I think I was.
Q. He went for the purpose of locating this claim, didn't he?
A. He went for the purpose of locating claims, prospecting, I might say.
Q. On what information did he go?

COUNSEL FOR DEFENDANTS: I object upon the ground that it is wholly immaterial and not cross-examination. Objection sustained.

Q. Do you know how long Pilkey had been up there when you got up there the last of November?

A. Well, I do not, any more than what he said that he went there about the 28th of October.

Q. How long did he stay?

A. He worked there until we got through, until we quit working.

Q. When was that?

A. Some time in December when we shipped a car-load of ore.

Q. Who paid Pilkey?

A. We all of us paid him.

Q. How much did you contribute to pay him; have you the record of it anywhere?

A. I have some record, I have not got them all.

358 Q. Can you tell how much was your share of what you paid Pilkey?

A. No, sir, I do not believe I can; I put up one time $150.00. I put up other money outside of that.

Q. For Pilkey?

A. For prosecuting the work.

Q. I want to know how much you paid Pilkey for your part?

A. I could not say.

Q. Who was the paymaster, who had charge of the paying?

A. Well, we gave money to Fagaly.

Q. You don't know how much you paid Pilkey?

A. No, sir, I would not swear positively as to that.

Q. Do you know from what time he paid Pilkey, began to pay him?

A. No, sir.

Q. Did he ever tell you?

A. I think not; he claims we owe him now $30.00 or $40.00.

Q. Was Pilkey interested in that claim?

Objection; sustained.

On redirect examination he said:

Q. Was any separate account kept of money that was paid Pilkey as being contributed by each one, or was the contribution general for the expenses?

A. Sometimes I would put up and sometimes Wills would put up.

Q. Well, but was anything said about what money—what the money was to be used for?

A. To pay the bills.

Q. What bills?

359 A. For materials, or pay Pilkey, buy grub to eat.

Q. Whatever was necessary?

A. Yes, sir.

J. A. JOHNSON.

J. A. JOHNSON, witness for the defence, being sworn, testified as follows:

On direct examination he said:

Q. State your name and residence and business.
A. I live in Albuquerque.
Q. How long have you resided in Albuquerque?
A. 8 or 10 years.
Q. Are you one of the defendants in this case?
A. Yes, sir.
Q. Have you ever been on the ground located as the Washington claim by the defendants?
A. Yes, sir.
Q. When did you first go there?
A. It was about the 28th or 29th of November, I think, in 1893.
Q. Who did you find there when you went there?
A. We found Frank Fagaly and Lee Walker, Charles Pilkey and 2 or 3 Indians and Colonel Wills.
Q. How long did you stay?
A. I believe I was there about two days.
Q. Did you see the original location of the Washington claim while you were there?
A. Yes, sir.
Q. Do you know what afterwards became of it?
A. No, sir.
Q. Do you know where it is now?
A. No, sir.
Q. Is it there now on the claim?
A. I do not know.
Q. When were you there last?
360 A. Well, I was there probably three or four weeks ago, maybe a month; I do not recollect the day, but probably a month ago.
Q. Did you see the place where it was posted when it was first put there?
A. I did not notice; I did not pay any attention to the location when I was there the last time.
Q. You don't know what has become of it?
A. No, sir.
Q. What work did you find done on the claim?
A. 6 or 8 feet of work done besides the cabin.
Q. Was anybody working there?
A. Yes, sir, these men I spoke of were working there.
Q. What were they doing?
A. They were sorting ore.
Q. Ore taken from the hole?
A. Yes, sir.
Q. Who did they say had sunk the shaft, done the work?
A. Frank Fagaly and Lee Walker and these Indians.

Q. Who did they say built this cabin?
A. Same parties.

Counsel for plaintiff objects to "what they said."
COUNSEL FOR DEFENDANTS: It is part of the *res gestee*.
COUNSEL FOR PLAINTIFF: I move to strike it out.
The COURT: I will not strike it out now.
COUNSEL FOR DEFENDANTS: I do not care much about it anyway.

Q. Did you examine the monuments on the claim?
A. No, sir.
361 Q. When did you come back—when did you go back next?
A. After I made the first trip, you mean?
Q. Yes, sir.
A. I do not remember when I did go up next; it was several months; it might not have been until the next spring or summer.

On cross-examination he said:

Q. Do you know how long Frank Fagaly had been up there?
A. I do not remember exactly, but my impression is he went up there about the 20th of October, somewheres along there, probably the 18th.
Q. Do you know whether he had been up there before?

Objection; sustained.

C. E. BONSALL.

C. E. BONSALL, witness for the defense, being sworn, testified as follows:

On direct examination he said:

Q. State your name.
A. C. E. Bonsall.
Q. Where do you reside?
A. New Town of Albuquerque.
Q. What is your business?
A. Receiver of the Washington mine at the time.
Q. How long have you been receiver of the Washington mine?
A. I was appointed on the 26th day of February, 1894.
Q. Did you go up there at that time?
A. Yes, sir.
Q. Did you examine the claim?
A. Yes, sir.
362 & 363 Q. What work did you find there?
A. I found a cut and shaft; the shaft was 8 feet deep; and a stone cabin.
Q. What kind of cut?
A. Well, it was an open cut into the ledge of the mine, I suppose, something like 8 feet.
Q. Did you find any location notice posted on the claim?
A. Yes, sir.

Q. What was it, the original or amended location of the Washington mine?

A. The amended location.

Q. Did you see anything of the original location?

A. No, sir.

Q. You have spent a good deal of time up there?

A. Yes, sir.

Q. Have you ever seen the original location notice up there anywhere?

A. Yes, sir.

Q. The original location of the Washington?

A. The original location was posted on the north end, that is north end center at the time I was there the 5th of March, 1894.

Q. It has disappeared has it?

A. Yes, sir.

Q. Do you know what became of it?

A. I rather think the storms, the wind blew it away.

Objection by counsel for plaintiff as to what the witness thinks, as the question is if he knew.

A. No, sir.

Q. You know it is not there?

Motion by counsel for plaintiff to strike out above answer
364 of witness objected to, and the court instructs the jury that it is not for their consideration.

Q. Where was the amended location posted?

A. It was on the discovery, the monument, a center monument.

Q. Was the monument upon the claim? (Objection as leading.) What did you find there in the way of monuments?

A. I found the north center monument, the location monument at the center of the claim, south center.

Q. How about corners?

A. The corners of the southwest corner was down; I could not distinguish that; there were three stakes there, but I could not make out the names on either stake.

Q. What did you do in the way of putting monuments there?

A. I recommended the survey of the four claims; three other claims while I was there Colonel Marmon made a survey, the court granting the order for the survey and it was made.

The COURT: The court ordered the survey?

A. So I understand.

Q. What other indications, if any, did you see anywhere on that claim of any work having been done prior to the time you first went there in March I believe you said?

A. I did not see any at that time.

Q. Except what you stated?

A. Yes, sir; well, there was a small little piece of work done fifty feet from the shaft for a blacksmith forge.

Q. The ground had been dug out for a blacksmith forge?

A. Yes, sir, blacksmith shop.

365 Q. That wasn't mining work?
A. No, sir.
Q. I speak of mining work.
A. That is all I saw.
Q. How thoroughly have you examined that claim?
A. I have examined it thoroughly from one end to another, from the south to the north end.
Q. What experience have you had in mining?
A. I have been mining—more or less in mining camps.

On cross-examination he said:

Q. What work did you say you found done there—the shaft how deep?
A. Something like eight feet, I should judge, from the top or croppings down.
Q. What else besides that shaft?
A. Stone house, a little stone house.
Q. What else?
A. Well, there was a blacksmith shop, the ground leveled for a blacksmith shop, and tools.
Q. Was that on the lead, where the blacksmith shop was?
A. No, sir; west of it.
Q. Is that all the work you found?
A. Yes, sir.
Q. Did you find a tree with a blaze on it on the south side, a blaze on the south side of the tree?
A. No, sir, I do not recollect.
Q. Did you find a tree blazed?
A. In the center?
Q. About the center of the Washington claim on the lead—well, on the south line.
A. South line?
366 Q. Yes, sir.
A. No, sir.
Q. Well, about the center of the claim?
A. There was a tree blazed on the south center of the Washington.
Q. Do you mean south end center?
A. Yes, sir.
Q. Was there a pine tree to the center of the claim on the lead with an old monument of stone up against it, a blaze on the south side of the tree?
A. No, sir; I did not see any such tree as that.
Q. Was there a stump about that position?
A. I think so, yes, sir.
Q. Was the stump blazed, or if there had been a blaze on that tree was it above the stump.
A. I should judge it would be above the stump.
Q. Was that tree gone when you were there February 5th, the first time, the first time you ever saw the ground, February 5th?
A. I did not go over the ground February 5th.

Q. That was the first time you went there?
A. No, sir, I went on the ground the 3rd of March.
Q. The tree was gone then?
A. Yes, sir.

J. Q. WILLS.

J. Q. WILLS, witness for the defense, being recalled, testified as follows:

On direct examination he said:

Q. Did you see any blacksmith shop or anything of that kind up there on that claim in November?
A. Yes, sir.
Q. Who had it there?
A. Mr. Fagaly.
367 Q. Using it about the work?
A. Yes, sir.
Q. He smoothed off a place to put it? (Objection.) What kind of arrangement was made, what did they do?
A. I do not believe I understand the question.
Q. What had been done on the ground, if anything, in fixing a place to put the forge?
A. The bellows had been put up there between some stakes set in the ground and the forge and anvil and such things as that.
Q. You stated when you were on the witness stand before about the end stakes, and stakes of the Washington, what were they?
A. The end center was a sappling I suppose about the size of that stove pipe (in court-room); it had been chopped off as high as a man could chop it with an ax and squared down.
Q. Was that done while you were there or had been done before you got there?
A. It had been done before I got there.
Q. How about the other end?
A. Mr. Fagaly and I put up the stake there.
Q. What kind of a stake was that?
A. Not so large as the other one, marked south end center of the Washington ledge.
Q. Was that made the same or differently?
A. That was set in the ground, the south end center one was.

No cross-examination.

CHARLES PILKEY.

CHARLES PILKEY, witness for the def-nse, being recalled, testified as follows:

367½ On direct examination he said:

Q. While you were on the Washington claim working for Fagaly, state whether or not there was any cabin there, stone cabin.
A. No, sir, there was no cabin there when I first got there.
Q. You say you went there on the 28th of what?
A. October.

Q. Was the cabin built while you were there?

A. Yes, sir.

Q. During that time?

A. Yes, sir.

Q. What other work was done while you were there,—mining work?

A. Well, they sunk in on the ledge, and after they had some ore out they had no dumping ground and they took and cut into where the cut was in the ledge, cut back and spread it all out for a dumping ground; that is where they sorted the ore.

Q. That made a cut you say in the ledge?

A. Yes, sir; it was sunk in the ledge first and the rock rolled back and they cut in here near the bottom of the hole, the Indians and us.

Q. What sort of shaft was sunk there?

A. The whole ledge was taken out.

Q. I am talking about the shaft; was there any shaft sunk there too at this time; they shipped some ore, where did they take the ore from?

A. Out of the shaft is where they got the ore; after when they went to sorting ore they leveled up and cut in intending to sink further down.

Q. When you went there on the 28th of October what mining work had been done at that time on the claim?

368 A. Well, there was a little work done. Fagaly had worked, I believe, a day or so before with the Indians.

Q. Where had that been done?

A. He didn't state to me; some four or five or six days before that.

Q. Where?

A. Right where the shaft is.

Q. What, if anything, did you say to Johnson, when he paid you $5.00, about going away somewhere—Ben. Johnson?

COUNSEL FOR PLAINTIFF: I do not know whether he intends to impeach his own witness?

COUNSEL FOR DEFENDANTS: I do not.

Q. What did you say to him about going off?

Objection; overruled; exception.

A. I told him if I could get my money, what was coming to me, I would go to butchering; that I would go off and get some cattle; whether he agreed to go in with me or not I do not know, but I didn't get the money for my work and I didn't go; I didn't get any money to buy any cattle with.

Q. State if you want to make any explanation or say anything about the testimony you gave this morning.

Objection, unless it appears the witness himself wants to do it voluntarily.

The COURT: I do not remember the limitation about that sort of thing.

COUNSEL FOR DEFENDANTS: My understanding is, if the witness makes a mistake or goes back voluntarily and asks to correct, it is one thing, and something comes out and he is informed of it and then consents is another thing.

Objection overruled; exception.

COUNSEL FOR PLAINTIFF: I would like to ask one ques-
369 tion first.

The COURT: I am doubtful whether there is such a thing as a basis to be laid preliminary to his condition of character and if there is not then you have only the right to ascertain on cross-examination. I think he has a right to correct his testimony.

A. I do not just understand the question and I——

The COURT: You are asked now if there is anything in your testimony you want to correct?

A. Yes, sir. I was asked if I had an interest direct in the Washington mine; I understood it, in my own name, and in writing or papers that would show that I did have.

Q. Now state what the facts are?

A. And I claim that I have none in my own name, but along in the month of May I think——

The COURT: What year?

A. This last May.

The COURT: Go ahead.

A. Lee Walker said to me, "I am going to divide with you; we have been friends a long while and you are in pretty hard luck." I said "Lee, I do not care for anything." He says, "Well, you have got to have it," and he says, "Well, I am going to make a deed to it." I said, "You need not make a deed to me." He says, "I am just going to split it in two and give you half I have got, and I will make a deed to Mr. Putney so you will have a just claim provided;" so that is the way it stood; I didn't follow him up, didn't ask him for it; it was his own; he volunteered it and said it was through the friendship that he had for me that he done this.

Q What have you ever received on account of it in any way?

370 A. No sir, I have never received nothing; it just remains that way. He says, he had a right to give me all of it if he wanted to.

On cross-examination he said:

Q. He made the deed to Mr. Putney?

A. Yes, sir.

Q. Who got the pay from Mr. Putney?

A. That I do not know.

Q. It was understood between you and Walker that Walker should deed your interest to Putney?

A. No, sir; he gave me this, I never had a claim in,—never wanted it. He said "I voluntarily give you this as a friend the same as I would give you anything as a friend;" not that I asked him for it or he owed it to me. We had been long, for many years, friends.

Q. It was all voluntary on his part?

A. On his side it was voluntary.

Q. Was that the first time anything came up between you and him about your having a fifth interest?

A. Yes, sir, that is the first time I had anything—he offered me a half.

Q. Half of what stood in his name?

A. He offered me a half in a copper claim; I told him I did not want it.

Q. I am talking about the Washington, half of what stood in his name would be a fifth to you?

A. I do not know how much he had. He said just what I have said; "I will divide with you."

Q. How much did he deed to Putney for you?

A. I never saw the deed myself.

Q. Did you know how much?

A. It is half of what he held; I do not know what it was; I never saw the deed.

371 Q. Was it all in Putney's name?

A. He went with his own free will and done it, and he said, "I owe this debt," as a friend to me, old friends, and when he was very sick he wanted me to take all of it. I said, "No, Lee, I will do what you wish."

Q. When was this deed to Putney, about the same time of this conversation between you and him?

A. No, sir; it was in May.

Q. How long was this talk before the deed was made to Putney when he first came to you?

A. Well, it was 3 or 4 or 5 days.

Q. That is for the first time you ever heard you were to have an interest in the Washington?

A. That is the first time. He came to me and said, "I am going to fix it for you as a friend if you will agree to go up there and go to work." I said, "I do not want to go up there if they can get along with him already," and I went off prospecting and he got sick.

Q. That was in May, 1895?

A. Yes, sir; last May.

Q. And never before that time was anything said with reference to your having an interest in the Washington?

A. No, sir, no interest or ever expected any. I thought at the time it was a great favor of him to give me work; I could not get anything to do; I had nothing to do, nothing that,—and he said, "You go up there and go to work;" that was along in——

Q. When did you first learn that you had made this mistake and testified this morning that you had no interest in the Washington; when did you first learn that you had made this mistake, as soon as you got off the stand?

372 A. Well, I understood if I had it in my own name.

Q. When did you learn you had made a mistake and testified in a way you wanted to correct?

A. Well, I just thought it over, that is all.
Q. Nobody told you at all?
A. No, sir; I just made up my mind that if the question was that way I was wrong, if the other way, I had a right in this mine.
Q. Just thought it up yourself and talked with nobody since you got off the stand until you got on now?
A. No, sir; I spoke to the court here about it.
A. I mean outside.
I. Outside people?
Q. Yes, sir.
A. No, sir.
Q. You don't mean to say you spoke to the court before?
A. As a witness?
Q. Anybody at all.
A. Well, I spoke to Mr. Childers and told him I wanted to correct that if it was right, and he told me to go on and correct this.
Q. You went to him first did you, you thought of this and went to him first?
A. I asked him if I had a right to state this question.
Q. That ain't the question: Did Mr. Childers call your attention to it or did you go to him first?
A. No, sir; I called his attention to it.
Q. How did this deed come to be made to Mr. Putney? Did Mr. Walker say he was going to make it to Mr. Putney for you or did you finally consent you would take it and asked him to put
373 it in Putney's name?
A. He went voluntarily and done it, to Mr. Putney, and he made the deed out and took it over there.
Q. Who thought of Putney?
A. He did, I expect.
Q. You never suggested Mr. Putney?
A. No, sir, I never had anything to,—any talk I know, with him in regard to it. Lee Walker made the deed and went there and gave it to him. He said, "I wanted to show you my friendship towards Mr. Pilkey, and I just give you this for Pilkey."
Q. You didn't suggest Pilkey to him, but he just went and gave it to Pilkey?
A. No, sir, I had nothing to do with it whatever on my part.
Q. You say Mr. Putney has not paid for this yet?
A. No, sir.
Q. Never paid you?
A. No, sir.
Q. Directly or indirectly?
A. Directly or indirectly; he don't owe me.
Q. Did you owe Mr. Putney a bill about that *that* time?
A. No, sir, I don't think I did; the books will show.
Q. You say you did not owe him anything?
A. No, sir.
Q. And that he was not paid in whole or in part in this deed from Walker to Putney?

A. No, sir.
Q. How does Mr. Putney hold this, for you or for himself?
A. He holds it for me.
Q. Well, how?
374 A. He told me, says, "I have got a deed here for you."
Q. Mr. Putney told you this now?
A. To some interest in the Washington?
Q. Mr. Putney told you that?
A. Yes, sir.
Q. When?
A. Well, it was shortly after it was given.
Q. Where?
A. At his place.
Q. In his store?
A. Yes, sir.
Q. Who was present besides him?
A. I do not know.
Q. Now, tell exactly what Mr. Putney said?
A. I told what he said.
Q. Tell it again.
A. He says, "I have an interest in the Washington mine for you which Lee Walker deeded to me;" that is what he said.
Q. What did you tell him?
A. I said "All right;" I says, "I did not ask him for it;" I says to him, "I did not ask Walker for it."
Q. Did Mr. Putney say anything about paying for it?
A. I never asked him whether he paid for it or did not.
Q. Did he say he would hold it for you and give it to you when you wanted it?
A. I understood it that way.

FRANCISCO GARCIA DE MAURO.

FRANCISCO GARCIA DE MAURO, witness for the defense, being sworn, testified as follows:
On direct examination she said:

375 Q. Do you know Charles Pilkey and his wife?
A. Yes, sir.
Q. How long have you known them?
A. Mr. Charles Pilkey I knew I think from 1880 or 1881.
Q. Where did they live, in whose house, since in Albuquerque?
A. At my house.
Q. Do you remember when he and his wife came back from the mines at Cochiti, about the first of October, 1893?
A. It seems to me that they returned about the 22nd or 23rd.
Q. Of what?
A. Month of October.
Q. Returned from where?
A. From the mines.
Q. What time did they get to Albuquerque?
A. It seems to me about the 23rd or 22nd.

Q. How long did they stay here?
A. I think Mr. Pilkey staid here until about the 27th or 28th.
Q. But you think they got back here about the 23rd, you say?
A. About the 23rd of October.
Q. How long did Pilkey stay here before he went away, after he returned?
A. I think he staid here until about the 27th or 28th of the month.
Q. In whose house did he and his wife live at that time?
A. In my house.
Q. He was not absent any night——

Objection.

376 Q. Where did he spend the nights during that period from the time you say he got here up to the time you say he went away?
A. He had his room and his wife, I cannot tell where he passed his nights.
Q. Did you see him every day?
A. Yes, sir, I saw him every day during the daytime.

On cross-examination he said:

Q. Where was Mr. Pilkey in October?
A. I know he came back from the mountains.
Q. In October, 1894, now, do you know; you can say you don't know if you do not?
A. In 1894 he was out in the mountains.
Q. Where was he in May, 1893?
A. He was out in the mountains.
Q. Didn't Mr. Pilkey come and talk to you today about your testimony?
A. Not to me.
Q. Have you talked to him at all what your testimony would be in this case?
A. No, sir; not to me.
Q. Who has talked to you about it, if anybody?
A. Mr. Pilkey asked me to do him a favor, to come over to the court-house, that he needed me.
Q. When did he say that to you?
A. At dinner time.
Q. Today?
A. Yes, sir.
Q. Have you any written record of the fact that Mr. Pilkey was at your house from the 3rd of October to the 27th or 28th in 1893?
A. I haven't any record.
Q. Do you just speak from your recollection?
A. Yes, sir, about my recollection.
377 Q. Did he tell you what he wanted you at the court-house for?
A. He didn't tell me.

Q. He told you he was at your house from October 3rd in 1893 until the 27th or 28th of October?

A. He didn't tell me.

Q. How long has Mr. Pilkey been living in your house?

A. About three years.

Q. Can you tell during that three years during every day he was at your house and every day he was in the mountains just from memory?

A. That year I could tell, because he then was living at the same place, the same rooms I am living now; he lives in a house of mine but away from mine; he pays rent for another house.

Q. How long did he live in these rooms he was living in October, 1893?

A. About one year.

Q. Do you know every day from memory when he was there and when in the mountains?

A. No, I cannot remember, but I remember about this particularly because about that time was the first time he started out on the trip and he went by himself and his wife staid there with me.

Q. Where was Mr. Pilkey the first week in May, 1893, at your house or in the mountains?

A. I do not remember, I do not know.

On redirect examination she said:

Q. Were you or not up there at the mines with Mr. Pilkey and his wife in September, 1893?

A. No, sir.

On recross-examination she said:

378 Q. Did Mr. Pilkey talk with you today about this month of October, 1893?

A. No, sir.

Re-examined by counsel for defendants:

Q. Were you up there part of the time in the summer of 1893, with them?

A. Yes, sir—no—yes, sir; I was there a short time.

Q. Wasn't you up there in July that year, a short time, with them?

(Objection; leading.)

A. I went there just on a visit to them for my health.

Q. About what time of the year was it?

A. The latter part of June.

Re-examined by counsel for plaintiffs:

Q. Are you on very friendly terms with Mrs. Pilkey?

A. Yes, sir.

Adjournment until 7.30 p. m.

Defendants rest.

In Rebuttal.

Mrs. ELLEN L. LOCKHART.

Mrs. ELLEN L. LOCKHART, witness for the plaintiff, being sworn, testified as follows:

On direct examination she said:

Q. You have been sworn?

A. Yes, sir.

Q. You are the wife of Henry L. Lockhart, the plaintiff in this case?

A. Yes, sir.

Q. Are you acquainted with Charles Pilkey?

A. Yes, sir.

379 Q. Do you know a gentleman by the name of Henry Lockhart?

A. Yes, sir.

Q. Do you know Ben. Johnson?

A. Yes, sir.

Q. Will you look at this paper (Exhibit 1) now shown you marked Exhibit 1 and state if you ever saw that before.

A. Yes, sir; I saw this before.

Q. When and where and in whose possession did you first see it?

A. In Mr. Lockhart's office when he was downstairs in the Columbus block when he had a justice of the peace office there and an insurance office in front, and in the possession of Mr. Pilkey.

Q. Do you remember when it was, in the evening or morning?

A. It was in the morning, sir, in the forenoon.

Q. About what date?

A. I think it was either on the 6th or 7th of May. If I had my register here I could tell just exactly.

Q. Of what year?

A. I think it was '93.

Q. The paper itself is dated, ain't it?

A. 1893, yes, sir.

Q. What was Mr. Pilkey doing with it when you saw it?

Counsel for defendant objects to question on the ground that the matter inquired about was gone into fully and is not proper in rebuttal. Objection overruled and counsel for defendant excepts to the ruling of the court.

A. He was trying to read it, sir, as I was cleaning the back office. Near where he was there was a door which was open and he
380 asked me to help him read; that he was not a very good scholar and it was hard for him to make it out, and I stood there and read the better part of it for him and he said he guessed he could make out the balance; he said he didn't do very much reading and writing, that his wife did the most of it, most of the writing, and I finally read it all for him, handed it back to him and continued cleaning the sample-rooms such as I was doing.

Q. Whose handwriting is the main body of that in?
A. Mr. Lockhart's, sir.
Q. Did you understand what was meant by my question if the counsel don't? (Due to side remark of counsel for defendant.)
A. Yes, sir.
Q. That I was asking you in whose handwriting the body of that paper is in apart from the signature?
A. Mr. Lockhart's.
Q. Did you see Pilkey sign it?
A. No, sir; I did not. I was cleaning the sample-room.
Q. When you had gotten through reading it to him what did you do with it?
A. I handed it back to him.
Q. You were there at the time of the signatures?
A. No, sir; I went back to the sample-room, closed the door and swept it out.
Q. What is the date of that paper?
A. May 7th, 1893. I remember the date and commenting on it; I have a daughter born on that date.
Q. It was an important epoch, was it?
A. Yes, sir; it was to me.
Q. And you remember this was upon that date?
381 A. It was upon Dolly's birthday; that is it was on the same day; that was on the same day of the year and month, but she was not born that day.
Q. Do you know Mrs. Stella Metz?
A. Yes, sir.
Q. Do you know where she lived in 1893?
A. She lived on Lead avenue; it is catacornered from my house west of it, kinder northwest.
Q. Do you mean from the house you lived in at that time in 1893?
A. Yes, sir.
Q. Did you see Mr. Pilkey in Albuquerque in September, 1893?
A. Yes, sir.
Q. Where and at what place?
A. I saw him on Railroad avenue in company with Mr. Lee Walker; I was crossing the road on the corner west of Molloy's there and he and Mr. Walker were near the alleyway.
Q. About what time in September was that?
A. It was on or about the 20th.
Q. Do you know where Levy Walker lived at that time?
A. I used to see him going to Mrs. Metz for his meals and I think he roomed there, but I will not be positive; I used to see him go to Mrs. Metz's and Mr. Pilkey with him.
Q. During what time did you see Mr. Charles Pilkey going to this house of Mrs. Metz with Levy Walker in 1893?
A. Well, I have seen him go there and come from there at meal times, supper and dinner chiefly.
Q. During what time in 1893?

A. About dinner time, between 12 and 1 and between 6 and 7.

382 Q. When the meals were ready?

A. Yes, sir; meal times.

Q. I don't mean that; what month?

A. I have seen him go there in the spring, when it was very hot; then I have seen him go there in September and I have seen him there then at the time he was over at the house in October, the fore part of October; in fact I walked over there part of the way one day with him, he met me a little west.

Q. Alone or in company with Lee Walker?

A. No, sir; this time he was alone, this time I have reference to, I overtook him and went from the corner with him; he wasn't with any other gentleman.

Q. You did not count yourself?

A. I do not count myself one of three; he and I were two.

Q. Well, do you know where Frank Fagaly lived at that time?

Q. No, I do not know anything about it. I supposed he lived over on the highlands somewhere but do not know.

Q. Where did Pilkey go at the time you speak of with you, that you and he were together?

A. He went down to Mrs. Metz's house and I went to my house for dinner.

Q. Did you see whether he went into the house or not?

A. Yes, sir; he went in.

Q. At what time was that occasion?

A. That was about half past 12 or 1 o'clock; close to 1 o'clock.

Q. About meal time again was it?

A. Yes, sir.

Q. I mean in what month and about what time of the

383 month.

A. The time he and I were together?

Q. Yes.

A. The fore part of October. From the first to the sixth.

Q. Previous to that time in September what can you say in reference to his having visited the house of Mrs. Metz?

A. I have seen him go there back and forth and supposed he made it his home there. (Objection to witness supposing.) He went there as though it was his home.

Q. And generally—I infer from what you say—about meal time?

A. Yes, sir.

Counsel for defendant- moves that the witness's testimony as to her supposition that Fagaly lived in the highlands be withdrawn from the jury's consideration without objection from counsel for plaintiff and the same is accordingly done.

Q. Were you present and did you hear the difficulty or quarrel that occurred along in the early part of October between Mr. Pilkey and Mr. Lockhart in regard to some assay?

A. No, sir.

Q. You didn't hear anything in reference to that?
A. No quarrel (objection) no quarrel.
Q. Conversation, then; excuse me for calling it a quarrel.
A. Yes, sir.
Q. What time was that?
A. Well, I think it was about the 4th or 5th, somewheres along there, or 3rd or 4th.
Q. Of October, 1893?
A. Yes, sir.
384 Q. Just please state to the jury what occurred.
A. Why, he asked Mr. Lockhart if he got the return from the assay from the ore he sent; Mr. Lockhart told him yes; I think he said it was Mr. Harris; that he would have to have a larger lot of ore in order to assay it properly, as he could not get that much out of any other assay; that had returned I believe 5 or 6 ounces in gold and he didn't consider it right.
Q. Who said that?
A. Mr. Lockhart.
Q. In what connection did he say that?
A. In connection with this ore he sent him down from the Sampson.
Q. And what, if anything, did Pilkey say about Lockhart having done wrong in not disclosing to him what the assay was? (Objection as leading, and sustained.) Please state what Mr. Pilkey said in reference to this assay. What was the substance of what he said?
A. He asked Mr. Lockhart why he did not send him a return of that ore, that he had promised to send it to him as soon as he got it, and Mr. Lockhart told him he did not consider it worth while sending because it was a small piece and that it was not hardly right judging from what the assayer said; Mr. Lockhart told him to send some more and he would have it assayed correctly and send it to him.
Q. Do you know who was the assayer who made the assay of this piece of ore?
A. It was Mr. Harris; Mr. Lockhart said Mr. Harris did not consider it exactly right himself.
Q. Did Mr. Pilkey ask for an order from Mr. Lockhart on
385 the assayer Harris to furnish a copy of the certified assay?
A. Yes, sir; a duplicate copy.
Q. What was done in the way of furnishing it when asked for?
A. Mr. Lockhart gave it to him.

Counsel for defendant objects to further testimony on this ground as not in rebuttal, which objection is sustained by the court.

Q. Did you have any conversation with Mr. Pilkey at or before this time that you have spoken of when the conversation you spoke of between Mr. Lockhart and Mr. Pilkey took place, in reference to the mining property in the Cochiti district in which Pilkey, Mr. Lockhart and Ben. Johnson were interested?
A. Yes, sir; on the afternoon of the day previous.
A. Yes, sir; on the afternoon of the day previous.

The COURT: Answer yes or no.

A. Yes, sir.

Q. Please detail that conversation to the jury, what Mr. Pilkey said.

Counsel for defendant objects upon the ground if it is an attempt to contradict Pilkey the question must be confined to a question asked him and to which his attention was called and a conversation about which he was asked.

The COURT: That is my understanding of the rule.

Q. Did or did not Charles Pilkey on the 2nd day of October, 1893, or the day previous to the misunderstanding between himself and Mr. Lockhart in regard to some matter of assaying of ore, say to you that the work upon the mining claims in which Lock-
386 hart, Pilkey and Johnson were interested, including the Sampson claim, had been all done in conformity with the requirements of the law?

A. Yes, sir.

Counsel for defendant moves to strike out the question and answer, which he inadvertently failed to object to, the same asked and given, unless counsel for plaintiff asks the witness some question that was asked the witness Pilkey while on the stand; to which counsel for plaintiff submits it is substantially the same question put to said Pilkey; which said motion to strike out is overruled by the court.

On cross-examination she said:

Q. You say you saw Pilkey here on the street in September, 1893?

A. Yes, sir.

Q. How many times did you see him?

A. Well, I saw him one day.

Q. Just once?

A. Well, saw him more than once.

Q. How many times that day?

A. Possibly three or four times, as he evaded seeing me.

Q. Did you speak to him?

A. No, sir; I could not get at him to speak to him; he was crossing the road and dodged into the alleyway so I could not see him; I went around the other way and saw him go in some place; it was in the alley.

Q. Did you tell your husband about seeing him that day?

A. I do not remember whether I did or not. I think I did tell Mr. Lockhart and Mr. Lockhart contradicted me and said he was not in town.

387 Q. Did he see him?

A. No, sir; he did not; I do not think he did.

Q. Did you convince Mr. Lockhart that you saw him?

A. I didn't try to convince him because I did not think there was anything necessary to convince him about it.

Q. Did you inquire why he was trying to avoid you?

A. I thought he was acting kind of queer and he was a drinking man or something of that kind and didn't want to see me.

Q. Was he drunk?

A. I do not know; I did not think that he was, but that was what I thought.

Q. How close did you get to him?

A. Across the road.

Q. He was on one side and you on the other side of the street?

A. Yes, sir, and I was back of the alley and he went into a house.

Q. Was anybody with him?

A. Yes, sir.

Q. Who?

A. Lee Walker.

Q. Anybody else?

A. No, sir.

Q. What house did he go into?

A. Some place in the alleyway.

Q. What alleyway?

A. Just in front of Mr. Molloy's.

Q. The alleyway coming out Railroad avenue?

A. Yes, sir.

Q. Between First and Second streets?

388 A. No, sir,—yes, sir, it is between First and Second streets.

Q. Do you think everybody that goes down that alley is trying to avoid somebody else?

A. No, sir; but he acted sheepish.

Q. Did you think he looked sheepish?

A. He acted sheepish and Mr. Fagaly told me afterwards he did try to avoid me.

(What Fagaly told her the court withdraws from the consideration of the jury.)

Q. You say you saw him during the summer of 1893 going to Mrs. Metz's house?

A. Yes, sir.

Q. Where was Mrs. Metz's house located?

A. It is on Lead avenue, West Lead avenue.

Q. Between what?

A. Between Fourth and Fifth; mine I think is the second house from Fourth and it is cati-cornering from that, northwest.

Q. You say the second street from Fourth?

A. My house is my adobe house on Lead avenue.

Q. Mrs. Metz' house is over there close to Fourth street and Lead avenue?

A. No, sir, it is on Fifth street I think and may be in the middle of the block, but my adobe house on second street from Fourth street.

Q. Between Fourth and Fifth streets on Lead avenue?

A. Yes, sir.

Q. On which side of the street?
A. My house faces north and Mrs. Metz' house faces south.
Q. Right across the street from each other?
A. No, sir; there is possibly three or four houses.
Q. Did you live there or at the Columbus hotel?
389 A. I ate my meals there and was there a good share of the time; I slept at the Columbus, Mr. Lockhart and I; the balance of the children slept in the adobe; we ate there and cooked there.
Q. Mrs. Metz kept a boarding-house there?
A. That was my understanding.
Q. How many boarders did she have?
A. Well, I have seen two or three go in there.
Q. Did you know them?
A. Mr. Walker, I have seen him going in there and then I have seen Mr. Lane, they call him the Major,—I do not recall his name, he is an old gentleman with gray whiskers, I have seen Mr. Pilkey go in there and some other gentlemen I do not know; I have seen several different ones go in there.
Q. Did you see Pilkey go inside?
A. I have, sir, frequently.
Q. How long did he stay inside?
A. Well, I did not wait to see.
Q. Do you know whether he staid at all, more than to go inside the door?
A. I have seen him come out and stay in there long enough for a person to eat; my common sense would teach me he was boarding there or eating there.
Q. Mr. Pilkey had a wife?
A. I know nothing about it.
Q. Did you see his wife around there?
A. I didn't see his wife around there; the only way I knew he had a wife was when he told me he had one when *when* he was reading this paper.
Q. What month did you see him go in there in the summer of 1893?
A. Well, I think I seen him go in there in July and August.
Q. What time in July?
390 A. I can't give you dates; I know it was awfully hot weather.
Q. How many times in July?
A. I cannot tell you that; maybe I seen him a dozen times or maybe 10.
Q. How many times in August did you see him go in there?
A. I can't tell you that.
Q. How many times in September?
A. I didn't keep track of how many times.
Q. Did you see him in September?
A. Yes, sir.
Q. You saw him go into Mrs. Metz's house in September?
A. Yes, sir.

Q. You are not certain about August?
A. Yes, sir, I am.
Q. Positively about that—did you see him there any time between the 10th of July and the 20th of August?
A. I didn't keep track of the dates.
Q. What is your impression?
A. I have the impression that I have seen him in those two hot months.
Q. Saw him frequently in those two hot months, August and July?
A. I seen him a couple of times a day, back and forth.
Q. During those two months?
A. Yes, sir.
Q. You say that you read that paper over to him?
A. Yes, sir.
Q. And you are not certain whether it was on the sixth or seventh?
A. I am pretty positive it was on the 7th.
391 Q. What time of day was it?
A. It was in the forenoon, sir.
Q. How early in the day?
A. It might be between 9 and 10 o'clock; I was cleaning up the sample-room for some traveling men and we always get our trunks up there between 9 and 10 o'clock, sometimes as early as 9.
Q. Had it been signed by Ben. Johnson?
A. There was no signature to it.
Q. Don't you know it was not the 6th?
A. No.
Q. You are positive?
A. No, but I think it was the 7th.
Q. Coming to think about it, wasn't it after 11 o'clock?
A. Not when I read it to him.
Q. How do you know?
A. Because I had to clean the sample-room and get it ready for two gentlemen coming with samples and naturally would have the trunks up there by 10 o'clock.
Q. Who were the gentlemen?
A. You can go to my register there, on my register; if you will inquire of my register you can see them.
Q. Where was Mr. Lockhart when you read it to him?
A. Out in the front office—the insurance office, and this office he was sitting in was the back office he used for the insurance office.
Q. Was there any partition?
A. Yes, sir, and a door.
Q. Where was Mr. Pilkey sitting when you went in?
A. Right up against a bench close to the window.
392 Q. In the back office?
A. Mr. Lockhart was in there with him and was called out to the front office.
Q. And it was while Mr. Lockhart was called out he asked you to read it over to him?

A. Mr. Lockhart wasn't there when I read it to him; he could have heard it being read.

Q. You can hear from one room to the other?

A. Yes, sir; it is a board partition half an inch, a thin board partition.

Q. You read it pretty loud?

A. No; I did not read it loud.

Q. Was Mr. Lockhart present when he asked you to read it?

A. No, sir; not that I know of. I can't remember that he was. I do not think he was there.

Q. Did he come into the room while you were reading it?

A. He was in the front office talking to some gentleman.

Q. He didn't come back until you had finished reading it?

A. I went into the room to clean the sample-room and I knew nothing that occurred after I went in there or who came in and went out. I could go out the back way; that is the way I generally went.

Q. How did you happen to go into the justice of the peace office?

A. Because the broom was kept in there and duster.

Q. He told you he didn't know much about reading and writing?

A. I said he told me he wasn't much of a scholar and it was hard for him to make out new writing.

393 Q. Did the judge have any trial there that morning?

A. I do not know what he had after I left.

Q. Did you see Mr. Hero (or Mr. H—— somebody, which sounded like Hero to the stenographer) around there?

A. No, sir, that was in the front part of the house and I had the sample-door room closed and could not see them.

Q. Now the ore they had trouble about was the Sampson ore?

A. That was my understanding.

Q. You don't know how many conversations Pilkey may have had with your husband about this assay do you?

A. No, I was not with them all the time; I just happened to be around.

Q. Now, on what day of the month was it on which they had this conversation that you heard about this ore?

A. It was in October.

Q. What day of the month?

A. Maybe anywhere from the 2nd to the 5th or 6th.

Q. Was that the time your husband gave the order on Harris for the assay?

A. Well, I believe it was.

Q. The same time.

A. That is my best memory of it.

Q. Who was present when the conversation took place about that?

A. I didn't see any one but Mr. Pilkey, Mr. Lockhart and myself.

394 A. You heard Pilkey tell your husband in a very friendly way that all work had been done on the Sampson claim up there?

A. He told me all work had been done on the three mining claims in the afternoon of one day and the forenoon of the next.

Q. What day was that he told you?

A. One of those days before the 6th of October.

Q. Did you ask him?

A. Why, I undoubtedly did ask him what he was doing and how the mines looked, if there was any mine going to amount to anything, and he said yes, we had two good properties, one named after me and the other was the Sampson; that the Sampson was the biggest thing ever found in New Mexico; I asked him if the location-work was done on it to hold them; he said the location-work was done on three of them and he left the tools on the Sampson; he said he came down here to fix his wife for the winter and as soon as he got her fixed up he was going back there and work the balance of the winter or until the weather got so bad he could not stay any longer.

Q. You have been very anxious to get testimony in this case, haven't you; to get witnesses to testify?

A. It was the most natural thing in the world, when you are robbed of your rights—(interrupted by objection).

Q. Have you offered to give Hub Leeds and Johnson and Wills deeds in your claim in these two mines of all interest they claim in this mine, if they would testify, or furnish you testimony in this case?

A. Hub Leeds and Johnson came to me six months ago and told me—(interrupted by the court instructing witness to answer
395 question)—I am here to tell the truth—yes, sir.

(Witness wishes to explain but was not permitted on this cross-examination.)

On redirect examination she said:

Q. What was the reason of making a distinction between Mr. Johnson and Mr. Hub Leeds and Pilkey, Walker and Fagaly in regard to their rights in this property?

A. I do not understand you.

Objection by counsel for defendant as to stating reasons of distinction.

Q. Please state what passed between these gentlemen; did you talk to those three gentlemen, Mr. Wills, Mr. Hub Leeds and J. A. Johnson at the same time?

A. Yes, sir.

Q. How did this come about that you talked with them about it?

A. Mr. Hub Leeds and J. A. Johnson told me we could have settled this a year ago by putting him on the stand, they could make a clean breast of it and tell how we were robbed.

(Objection by counsel for defendant.)

Q. Did they say robbed by whom?

A. By Pilkey, Walker and Fagely—that they could go on the stand and break up this case immediately, if they wanted to, if we would give them a deed of the interest they now hold in the Washington, three-twentieths each, I believe, that they would go on the stand and do this. They demanded the deeds and I would not give them the deeds until they entered into a contract.

Q. Give them deeds to what?

396 A. To the Sampson, if they would enter into a contract; it was they that brought it around and not I.

Q. Did they state in what way Mr. Lockhart had been swindled by Pilkey, Fagely and Walker?

A. Mr. Hub Leeds in collusion——

Interrupted by objection.

Q. Was that the conversation with the gentlemen referred to where you proposed to give these three deeds for an interest in the Sampson—was this all in that same conversation? (This question was by the court.)

A. No, sir. It was at different times, and the proposition was from them and not from me. (Objection, and the court rules that only the witness' answer, "No, sir." and not the balance of the answer should go to the jury; the balance being withdrawn from their consideration. Counsel for defendant desires to know how much of the witness' testimony is allowed to remain in, and the court informs him that it is only the witness' answer "No, sir," that is allowed to remain, and that the exclusion of the balance is in reference only to the last answer of the witness. Counsel for defendant then withdraws his objection to any of the witness' testimony, and the court instructs the jury that all the witness' testimony is before them for their consideration. Counsel for defendant states that he waives his objection upon condition that he shall have the right of cross-examination of the new matter thus brought out, which is granted by the court, subject to the rules of evidence which shall be passed upon when the time arrives.)

Q. What was the rest of your answer?

397 A. Mr. Hub Leeds told me that he was in collusion,—that Mr. Pilkey was in collusion with Frank Fagely and Lee Walker all the time from the time he first went up there up to the time he abandoned the claim and it was relocated.

Q. What, if anything, did they say with reference to their being ignorant of and innocent of this arrangement between the others?

A. They said they would go on the basis they were innocent purchasers. They were not all together when these conversations occurred,—it was at different times, and they proposed the question to me before I did to them.

Q. Did they state when they had learned of these acts of Pilkey, Fagely and Walker with reference to their becoming interested in the property?

A. They said in the first place that Mr. Pilkey, Mr. Lee Walker

and Mr. Frank Fagely and Mr. Neeland were going to go into this scheme and do Mr. Lockhart up, and that they got money from Mr. Neeland.

Q. Who did?

A. Mr. Pilkey, Mr. Walker and Mr. Fagely,—I think it was $100 from Mr. Neeland, and after going up there and seeing the value of the Sampson mine they came back and got money, and paid Mr. Neeland his share and then went and located it in the name of the Washington, in the name of Walker, Johnson, Fagely and Hub Leeds.

Q. Who had so located it?

A. Those people had,—that Mr. Fagely,—he came,—that Mr. Walker was to hold one-fifth interest, he having two fifths, the others one-fifth each, for three of them,—Mr. Walker having two fifths, or to hold one-fifth for Mr. Chas. Pilkey, not in Mr. Pilkey's name, only in a private way, under cover. Then Mr. Frank Fagely,—
398 then they thought then they wanted somebody else that had some money and took in Mr. J. Q. Wills, and Mr. Frank Fagely becoming dissatisfied with Mr. J. Q. Wills made trouble, and there has been trouble with them ever since. Now these people repeatedly said this thing was not to go before the court and I denounce them here, gentlemen, as imposters.

Counsel for plaintiff moves that this language of the witness as to imposters be stricken from the record, to which counsel for defendant objects, and it is left in.

Q. What, if anything, did those three gentlemen claim as to their connection with this arrangement between Pilkey and Walker——

Question objected to as leading, and sustained.

Q. Did those gentlemen in that conversation say anything as to how they came to be connected with this Sampson mine themselves?

A. Yes, sir.

Q. What was it?

Counsel for defendant now withdraws his waiver of objection to further testimony on this line and renews his objection to same, which objection is sustained by the court over the exception of counsel for plaintiff in not permitting the witness to reply to the last question asked her.

On recross-examination she said:

Q. When was the last time you had any conversation—when was this conversation you had with Hub Leeds in which he told you——

A. Well, sir, it has been happening for the last year.

Q. The time you talked about giving them the deeds?

399 A. I can't remember.

Q. Have you been talking about that for a year or only the last two weeks?

A. For the last six months.

Q. You have been talking about giving him the deed for the last six months?

A. No, sir; he has been talking to me about wanting the deed. Mr. J. A. Johnson told me in the court-room yesterday morning if I wanted to do anything I would have to do it quick.

Q. When was it he talked with you about giving him the deed—in the Columbus hotel, when you asked him to come up and see you?

A. They have been up at the Columbus several times.

Q. Haven't you asked me three or four times in the last year if you couldn't settle this lawsuit?

A. Yes, sir; I always think it better to settle a lawsuit.

Q. Did I approach you or you me?

Counsel for plaintiff objects to any testimony of witness in regard to compromise proceedings as inadmissible, and the court rules that the question, as he understands it, is to show whether the witness first approached defendants or they her in order to show whether the witness' conduct is consistent; which counsel for defendant states is the reason for asking the question; and objection is overruled.

Q. Did I approach you or you me?

A. I can't tell you, I know there has been a good deal of work going back and forth between you and them, the attorneys and myself.

Counsel for plaintiff objects that it is not proper recross-examination, and then waives his objection upon the privilege being
400 granted him by the court to re-examine the witness as to this new matter *matter* being brought out by counsel for defendants.

Re-examination by counsel for plaintiff:

Q. What was said by you to Mr. Childers about it being better to settle this?

A. Like all lawsuits, half a loaf is better than no bread. It is better to settle a case out of court than to go into court and be bothered with it.

Q. Which of the defendants were involved in that proposition of settlement with Mr. Childers?

A. Mr. Johnson, Mr. Hub Leeds and Mr. Wills.

Q. Messrs. Childers and Dobson, were they involved in it?

A. Yes, sir. Mr. Dobson and myself have been talking over a settlement and were very anxious to do so, and waited for Mr. Childers to come home before we consummated it. If you expect me to tell the truth I am going to do it.

Adjournment until Monday, Feb 17th, 1896, 9.30 a. m. Feb. 17th.

COUNSEL FOR DEFENDANTS: I ask leave of the court to bring the reception book from the probate clerk's office to prove when Lock-

hart filed for record the original notices for these two claims, the Mammoth and the Ellen L.?

COUNSEL FOR PLAINTIFF: It may be considered in whatever the record shows.

COUNSEL FOR DEFENDANTS: The record shows (reading) that the location notice of the Mammoth mine was filed on July 11th, 1893, by Henry Lockhart; and the location notices of the Clear Creek and the Ellen L. mine were filed by him on the same day.

401 COUNSEL FOR PLAINTIFF: I consent as to the Mammoth and the Ellen L., but object as to the Clear Creek being entered into the record.

COUNSEL FOR DEFENDANTS: We claim that all three mines were testified to by Lockhart, and he admits there never was any work done on the Clear Creek and says his reason for not filing the location notice on the Sampson was he was waiting for Pilkey to notify him the work was done.

COUNSEL FOR PLAINTIFF: I object because it introduces a new element. Whatever was said as to the Clear Creek was accidental, and as to his reasons which caused him to record the Clear Creek, as to whether he had as to that received any information from Pilkey that the work was done, or why it was, it will be necessary to enquire into it.

COUNSEL FOR DEFENDANTS: We are offering it as a part of our case which we omitted, and the plaintiff can question Lockhart as to it.

COUNSEL FOR PLAINTIFF: I supposed the fact of his not recording the Sampson, defendant's purpose was to show Lockhart intended to abandon the Sampson; but there are other considerations and this would tend to mislead the jury. And we object upon the ground that it is irrelevant, immaterial and calculated to mislead the jury.

Objection overruled by the court, to which ruling counsel for plaintiff saves his exception.

Reception book from probate clerk's office introduced in evidence for the purpose of showing that Henry Lockhart filed for record the location notices of the Mammoth, Ellen L., and Clear

402 Creek mines, on the 11th day of July, 1893, page 384 of said reception book, over the objection and exception of counsel for plaintiff, as above.

JOHN NEELAND.

JOHN NEELAND, witness for plaintiff, being sworn, testified as follows:

On direct examination he said:

Q. What business were you engaged in in 1893?
A. My regular business was bar-tender.
Q. Did you know Levy Walker and Frank Fagaly at that time?
Q. Yes, sir.
Q. Were you also acquainted with Hub Leeds and J. A. Johnson?
Q. Yes, sir.

Q. Did you know Charles Pilkey at that time?
A. Yes, sir.
Q. What was the occupation of Frank Fagaly and Levy Walker?
A. Gamblers.
Q. Were you connected in any way with them or either of them in business at that time?
A. Yes, sir.
Q. Which of them and in what way?
A. Me and Frank Fagaly were connected in a faro bank together.
Q. As partners?
A. Yes, sir; as partners.
Q. What do you know, if anything, of Frank Fagaly's connection with a mining claim in the Cochiti district called the Sampson?

COUNSEL FOR DEFENDANTS: I object, unless his knowledge
403 is his own and not what Fagaly told him, as not rebuttal, not material and not relevant in this case. I suppose it is proposed to bring out the same evidence which the court excluded before.

COUNSEL FOR PLAINTIFF: It is my purpose to bring out what we think competent.

The COURT: How do you claim any statement of Fagaly is rebuttal of anything produced by the defense?

COUNSEL FOR PLAINTIFF: If the court please, that Fagaly's and Walker's statements and declarations are evidence as against interest, both being dead, I presumed would not require argument, and the only question is whether the evidence when elicited would be relevant to the issue. Now, as I understand the court, upon the plaintiff's case-in-chief, when this and other witnesses were called in reference to statements and declarations in regard to this mine were offered, held that it was not admissible, upon the ground that the law presumed, from the pleading that was filed by these defendants, that they were in possession at the time that the suit was brought, and that it was sufficient, for a *prima facie* case, for the plaintiff to show a prior possession of himself, which we had shown as we supposed completely enough by the testimony by the plaintiff that the plaintiff was in possession through the prior possession that Pilkey had taken of this property and this his possession as tenant in common with Lockhart and Johnson was their possession, and that the admission of the plea that the defendants were in possession when the suit was brought was *prima facie* enough to cast upon them the burden of showing that their entry upon the property was rightful. We had assumed as offering this evidence as
part of the plaintiff's case-in-chief that the burden rested
404 upon the plaintiff not only to show prior possession of plaintiff of the premises but that possession continued until they were wrongfully ousted of the possession by the defendants or some of them, and offered this testimony at that time upon that theory; but upon the court's holding, which some of the authorities sustain, that we were proceeding beyond what was necessary to make a *prima facie* case at that time by offering the testimony of this and

other witnesses to prove that the intrusion of the defendants *were* wrongful and that the intrusion was upon the prior peaceable possession of the plaintiff——

The COURT: How is there any other question here but prior possession and abandonment? How would this come in?

COUNSEL FOR PLAINTIFF: They have introduced evidence here now, the defense,—we having rested the case upon a prior possession as shown—they come in here and offer the testimony of Pilkey—whatever testimony they have offered—the whole purpose and effect of which is to show that their intrusion upon the prior possession of plaintiff was not wrongful but that it was rightful for the reason that at the time of their intrusion upon the premises the prior possession of plaintiff had been abandoned, as your honor suggested. I think that is the substance of what the evidence offered by them tends to prove, if anything—that the ground was at the time of their intrusion abandoned and subject to relocation; and any testimony that we may offer that tends to rebut that testimony on the part of the defendants is proper—if no part of our case-in-chief—in rebuttal of the defense, now set up here; and we expect to show the fact that this ground at the time defendants entered had not been abandoned
405 by the plaintiffs here, Lockhart and Johnson, but that at the time they so entered into it it was actually held by plaintiffs through Pilkey up to the moment that Pilkey let them into possession with him, thereby ousting the plaintiff, and as to the time at which that occurred the theory of the gentleman seems to be that the ouster by these defendants could only occur when there was an open taking possession by means of posting this location notice on October 23rd of the Washington, whereas we think that it is not the correct theory but that we can show that the date of entry preceded October 23rd, that in fact it dated back to the latter part of September and certainly to a period of time antecedent to the expiration of 90 days from July 10th, 1893, when the Sampson location notice was posted—your honor having given us leave to enquire—assuming that 90 days by analogy was a reasonable time in which the plaintiff might have gone on and completed his possession—that as a matter of fact the intrusion of defendants was in September, and that consequently the defendants' attempt to show here that it was abandoned when the defendants entered was untrue as a matter of fact; and the authorities all are, that the question of ouster possessoin is one of fact. It is one for the determination of the jury upon all the evidence; and we expect to show that the testimony of Pilkey for the defense here is absolutely untrue that he did nothing and nothing was done upon the Sampson claim after he posted the location notice of the Sampson there on July 10th; that it is absolutely false, and we expect to show it to be false, not by eyewitnesses, who were not on the ground, but by statements made to Pilkey, by Fagaly, by Walker, himself.

406 COUNSEL FOR DEFENDANTS: I wish the court would send the jury out without listening to their statement, (etc.)

The COURT: The jury will go outside.

Jury withdrawn from the court-room.

The COURT: You say your purpose is to show these parties went up there in September?

COUNSEL FOR PLAINTIFF: Yes, sir; in pursuance of an agreement between them and Pilkey who was up to that time in possession as co-owner to plaintiff here and Johnson, and that—the jury not being here now—the purpose of going up there in September in the first place was a report by Pilkey of the richness of that claim and that Fagaly went up there in September for the purpose of looking it over and ascertaining whether they wanted to acquire it or not and that he accompanied and went upon the claim and obtained specimens of the ore from different piles of the lead and returned here with it and had assays made of it which ran high—I think the witness stated on the other examination some $2,600 00 or more; at all events that the returns were such as to induce him, in connection with Walker, through whom he had been brought into connection with Pilkey, the plaintiff's agent and representative on the claim up there, to—(interrupted by the court.)

You do not expect to show any work done on that claim, except boundary marks?

COUNSEL FOR PLAINTIFF: To the extent of taking the ore out for examination, and we expect further to show that upon this return being had as to how the ore ran, that this arrangement, which included Fagaly, Walker, and their associates before Pilkey
407 came again to Albuquerque about the first of October, and that somewhere about the 6th or 7th of October that Pilkey and Fagaly left and went up and took possession of this claim before the expiration of the 90 days.

The COURT: By statements of Fagaly?

COUNSEL FOR DEFENDANTS: By statements of Fagaly, Pilkey and Walker, yes, sir.

The COURT: On the contrary it is shown that Pilkey was here on the 3rd of October and that he notified Lockhart he would not have anything to do with the contract and notified Ben. Johnson that no work had been done, and how can statements by Pilkey to outside parties be admissible?

COUNSEL FOR PLAINTIFF: We propose to show that is a pretext and sham and the facts entirely different from his statements.

The COURT: Suppose it is a sham, how can that be considered as evidence as against direct acts between the parties themselves?

COUNSEL FOR PLAINTIFF: The direct acts we expect to show by these statements and their own admissions in reference to it, that Pilkey had in fact turned this over to Fagaly adversely to the plaintiff in September, after getting the assay, and actually went up and took possession after he had given this notice down here about the 3rd or 4th or 5th of October.

The COURT: How does that go to the question of abandonment, even though it turned out these people were up there, if Lockhart took no steps to prevent abandonment, how does that excuse his abandonment?

COUNSEL FOR PLAINTIFF: We contend we are not concluded by Pilkey's statements as to Lockhart's abandonment. It is certainly competent for us to prove that these statements of Pilkey are absolutely false.

408 The COURT: Lockhart and Johnson admit that Pilkey gave him notice he would have nothing more to do with it, and Johnson admitted that Pilkey's statement that he would have nothing more to do with the mine, was true.

COUNSEL FOR PLAINTIFF: That was about the 5th of October.

The COURT: As a matter of fact, suppose those parties had been on the claim, and if Lockhart abandoned any time afterwards it would inure to their benefit, if there was any benefit to inure, just as much as if they had gone the 6th or 7th or 8th, and would not change the quality or legal deduction from Lockhart's act.

COUNSEL FOR PLAINTIFF: Abandonment is a question of intention and a fact to be determined by the jury.

COUNSEL FOR DEFENDANTS: By acts of Lockhart and Johnson and not by declarations of Fagaly.

COUNSEL FOR PLAINTIFF: The proposition, or question of ouster to property is a question of fact for the determination of the jury, and I think your honor misunderstood Mr. Lockhart if you understood him to say that even on October 5th, or whenever it was that Pilkey says this quarrel occurred with reference to the assay of the ore—if your honor understood Mr. Lockhart or Mr. Johnson either to say that they acquiesced in that abandonment.

The COURT: I did not say that; but I say that Pilkey gave them then and there he would have nothing to do with that.

COUNSEL FOR PLAINTIFF: We admit that Pilkey said he was out of it, but his acts do not bind Lockhart and Johnson unless they are able to satisfy the jury that Lockhart and Johnson did acquiesce in it and did abandon it. That must be too with knowl-

409 edge of what the actual facts were; but wholly independent of that we expect to show that notwithstanding this notice of Pilkey's about the 5th of October, that as a matter of fact this agreement had been entered into with Pilkey and Fagaly had gone up there and had actually gone into possession under the new arrangement with these other parties before Pilkey came here to Albuquerque at that time he swore.

The COURT: I do not see how that affects the quality of Lockhart's act.

COUNSEL FOR PLAINTIFF: It does as showing the wrongful character of the entry.

The COURT: Their wrongful entry does not excuse his lack of precaution to take care of himself.

COUNSEL FOR PLAINTIFF: I submit that is a question of fact what he did. His testimony was very clear and explicit; that on the 20th of August he went personally up there and on the ground with Pilkey and in going over it his last act was to direct Pilkey to proceed to do this work that they all supposed was requisite under the mining laws and that Pilkey then stated to him he had some work to do on the Ellen L. and Mammoth, and Lockhart called his

attention to the fact that the time was getting short in which to sink the hole on the Sampson, and the testimony shows that the last thing Pilkey said to him was that he had found a soft place on the lead and not to be afraid that the work would be done in time and he could sink that 10-foot hole very quickly and would do so; whereas, Pilkey testified that not a thing was done or attempted to be done except the posting of that notice and Lockhart never did anything in regard to it. Now this testimony is competent to prove that not only if this work was not done, as Pilkey repre-
410 sented that it was, because Pilkey so far as he was concerned had before the 5th of October and before any notice was given to Lockhart or Johnson in reference to abandoning them, that he had already completed the turning over to Fagaly and Walker for themselves and their associates, and certainly we can prove that by declarations and admissions of these parties.

The COURT: I do not see where it is rebuttal.

COUNSEL FOR PLAINTIFF: As I stated before, we thought it was a part of our case-in-chief to show that the taking of possession by defendants was wrongful and not upon abandoned ground, which they claim and practically now their sole defense. We want to negative it by showing the contrary.

The COURT: There is nothing to show that Lockhart abandoned except that Lockhart and Johnson got notice from Pilkey and they left the mine stand without taking any other steps.

COUNSEL FOR PLAINTIFF: That was on the 5th or 6th of October and at the time this notice was given to Lockhart there remained but one or two or three days before the 10th when the 90 days expired and the reason we did not then attempt to do anything was the shortness of time and the fact that they had learned not only from this notification of Pilkey that he had abandoned it but they learned further that the ground was then actually in the possession of Fagaly and it was wholly useless for them to attempt to do anything then at that time.

The COURT: I do not see how this witness' testimony as to what they had been doing is admissible. They might have schemed from the 8th of May to the 10th of October and I do not see how it affects this question of Lockhart's abandonment.

411 COUNSEL FOR PLAINTIFF: That is to say upon the theory of ouster or dispossession, the actual ouster or dispossession, entry upon the prior previous possession of plaintiff, wrongful entry must be shown, and that the mere conspiring is not admissible—even upon that theory the evidence we offer goes to acts amounting to dispossession by Fagaly in September and in that connection to show the wrongful ouster or dispossession. Pilkey while on the stand testified he was not here at all in Albuquerque during that month of September, was not here until he came down on the 5th of October. Now this testimony we offer goes to prove he was here, that he was with Walker, at least, and others, and that Fagaly accompanied him back upon this ground as we claim to consummate the turning over by Pilkey to him of this ground that is in controversy, and, as I have said before, it is certainly a question of

fact. What was the purpose of Fagaly going upon the ground? Was not his taking the ore from there an association of interest in himself in that ground? What was the purpose of taking the ore and sending it off to be assayed except with a view of asserting title in himself, and that is a question for the jury to determine. If they should determine there was no actual dissension or entry they only have to hold within the period of 90 days, it is for the jury to say whether within that period there was a wrongful entry or intrusion of Fagaly for himself and codefendants upon the ground and an assertion of a right to it; and certainly we are not concluded by the testimony of Mr. Pilkey or other testimony of these defendants here; anything that tends to disprove that fact that Lockhart and Johnson had abandoned it prior to the expiration of that 90 days and anything that tends to prove that the defendants
412 did not go upon it until after the expiration of the 90 days is competent evidence to go to the jury to determine those two possessions. So that we offer this testimony in the first place to prove that it is untrue that so far as the plaintiff is concerned and Johnson there was any abandonment whatever of those premises, and in the second place to disprove the allegation that the defendants did not wrongfully enter upon it while it was in their rightful possession, that is to say, within the 90 days, and that as a matter of fact the entry of these defendants was upon that rightful peaceable possession and within the period that your honor has indicated; and if we establish those facts certainly the evidence is competent and relevant upon those issues, and it is beyond all doubt that the question of possession, prior possession and the question of ouster or wrongful intrusion is a question of fact for the determination of the jury, and they can give such weight and credibility to testimony as they may deem fit. But as to its being evidence in rebuttal, we not having been permitted, or not choosing to offer it in chief; I think if we had submitted it without intimation from your honor of some proof of possession and possession by the defendants at the commencement of the action, the gentlemen would have asked instruction for not having shown these facts, but your honor having intimated as to the order of evidence, we simply rested upon that proof. Now, they having introduced their evidence tending to show affirmative facts, we are not permitted to go into it, and there is no evidence before the jury at all on our side of that subject, not one scintilla, and now the gentlemen contend after they have
413 offered evidence tending to claim a state of facts with reference to possession and entry by defendants, we are not allowed in rebuttal to meet it, and it seems to me such a position is contrary to all the principles of law and rules of evidence, and to cut us off without being heard upon matters which they for the first time introduced as matters of defense, it seems to me like tying a man's leg and winning the race.

COUNSEL FOR DEFENDANTS: If it please your honor——

The COURT: I do not want to hear from the defense. It is a mere question as to whether Lockhart abandoned this claim. The fact that Pilkey and Fagaly were scheming all summer, and Pilkey

deceiving him does not affect the quality of Lockhart's acts as to abandonment, and certainly if that is incompetent evidence it should be excluded from the jury, as any one can see its prejudicial nature. I believe, myself, that the defendants in putting in their defense have gone into a lot of things having nothing to do with the case. It is simply a question whether Lockhart prosecuted the work on that claim according to the nature of the property he was endeavoring to hold, or did not. If he did prosecute the work there, he held it; if he did not prosecute the work he did not hold it.

COUNSEL FOR PLAINTIFF: In the view of the court I see that is the only issue in the case, as to whether or not there had been an abandonment of plaintiff as to his right of possession, which is admitted existed at one time, and surely whether that was abandoned by him during the period which the court has held he was entitled to the possession,—(interrupted by the court.)

The COURT: I did not hold that. I said the only question
414 of fact I saw before the jury is whether or not Lockhart under the circumstances reasonably prosecuted the work, or whether an unreasonable time elapsed. I tried to indicate to counsel and you if I had misled you by my rulings you could state so.

COUNSEL FOR PLAINTIFF: I took what your honor said the other day to be a concession of the fact that the discovery of this property and the exercise of acts of ownership and dominion over it, publicly and openly claiming possession of it, constituted such prior possession as would be recognized against a trespasser, and your honor said "How long a time?" I said this not being upon the public domain and the m-ning laws not applying to it, that 90 days, by analogy, I would suggest would be a reasonable time within which plaintiff after taking possession should proceed to do whatever was necessary to continue the right of possession, the period of 90 days from the day of posting the location notice upon a claim under the laws of the Territory being fixed by statute; and it is conceded and held by every authority that during that entire period which the law gives after posting the location notion the discoverer has the right to continue and perform the acts necessary to entitle him to the possession. In Colorado and some other localities the period is less, but here it is less, and during the period, whatever it may be, that, under the mining laws is given to the locator in which to sink the 10-foot hole and monument the claim as against the world. His failure to sink that ten-foot hole when able to sink it on the 89th day would continue that right of possession which up to that time is guaranteed to him under the mining laws, and his failure to do it until the 89th day does not forfeit his claim, and the same in regard to monumenting the
415 claim. His right to absolute possession of that claim continues from discovery and upon taking possession by posting his location notice up to the expiration of the 90 days where the property is upon the public domain. Now there is no controversy as to that fact. In this case the same kind of acts that would be necessary to continue the right of possession upon this property

upon the ground, the same period of time certainly would be reasonable. It is for the court to fix what is a reasonable time because the law does not apply to it, and this is the first case arising in this Territory that this question has arisen under the act of 1891 creating this court of private land claims; and there are scattered all over the ground scores and scores of mining claims, and it is important that the court here should determine, inasmuch as the statute has not fixed the time within which the discoverer of a lead upon that ground shall proceed to work, what is necessary for him to do, or whether the entire analogy of the mining laws as to sinking the 10-foot hole applies up there. It certainly does apply as a matter of law, and therefore all these matters the court would have to determine as to what constitutes the right of possession of a discoverer of a claim up there (Cochiti mining district), and apply, as I understand your honor to do, this period of 90 days.

The COURT: That was only a remark of yours; you said by analogy the 90 days.

COUNSEL FOR PLAINTIFF: Then I would like to have your honor, if it is to be determined by the court; I would like to indicate to your honor that period as reasonable and proper in which to do certain acts and to determine whether the acts shall be those
416 required upon location or such acts as evidenced good faith to work the mine, whatever they may be; and I suppose your honor would not hold as a matter of law that it was necessary for the holder of a claim discovered upon this ground to comply with all the requirements of the mining law that apply to mines on the public domain, as a matter of law?

The COURT: No.

COUNSEL FOR PLAINTIFF: What else is necessary and reasonable to evince good faith and the determination of the discoverer of the claim to hold and work it, and what would your honor hold, independent of the statute, is required of the discoverer's appropriation of the claim upon the ground? I say that nothing more under the circumstances should be required, there being nothing absolutely required by law, but as a reasonable matter nothing more than the evincing of the purpose in good faith to prosecute with all reasonable diligence the work of mining and extracting ores from it; that is all, and that of course would be governed by circumstances applicable to the particular claim and how it was situated.

The COURT: I require a basis to be laid for the introduction of this testimony. Can you connect it, or unless you can show some reason why you cannot lay the basis in advance, I think I should exclude it as the court could not afterwards rule it out, and I shall rule this testimony out unless you promise to connect it.

(NOTE BY STENOGRAPHER.—My record shows the basis to be laid as suggested by the court or counsel, viz:) That Lockhart was not able to go up there and take possession of the claim within the 90 days because the defendants were already in possession, and this
417 is the basis for the testimony in question of the witness now on the stand.

The COURT: After Pilkey notified them the work had not been

done Lockhart and Johnson could have gotten up there before the expiration of the 90 days.

COUNSEL FOR PLAINTIFF: That is a question of fact for the determination of the jury as to whether or not they could have gotten tools and supplies and all that was necessary in time to get upon the ground to do it.

The COURT: Whatever it is, there must be some ground laid for the introduction of this testimony.

COUNSEL FOR PLAINTIFF: We will recall Mr. Lockhart upon these questions of fact.

The COURT: All right.

COUNSEL FOR PLAINTIFF: I want to ask one or two questions of this witness upon matters connected with it, and that certainly there can be no question of admissibility upon the line your honor has indicated.

The COURT: I will not hold the plaintiff down to the exclusion of the jury upon his statement.

The jury return to the court-room and the jury-box.

COUNSEL FOR PLAINTIFF: These questions I will ask are preliminary to laying the basis for the introduction of former testimony, at present ruled out upon the objection of defendants.

Q. State what you know with reference to Walker or Fagaly or both going up to this Sampson mine in company with Charles Pilkey?

COUNSEL FOR DEFENDANTS: I want the witness to know this question is asked of his own knowledge.

COUNSEL FOR PLAINTIFFS: The statement of the parties themselves is proper proof of it.

418 The COURT: I have indicated that any representations of Fagaly as to taking possession prior to September 1st, was not evidence until some basis was laid of the sort I have indicated. You can ask about that. I let the jury come in because I thought we understood each other.

COUNSEL FOR PLAINTIFF: I understood your honor to say that any evidence tending to show possession taken by them within this period was competent.

The COURT: No.

COUNSEL FOR PLAINTIFF: Shall I confine it prior to October 10th, as to their going upon the ground prior to October 10th? The intention will show afterwards.

COUNSEL FOR DEFENDANTS: The basis of my objection is, that this witness was on the stand before, and all he knows is the declarations made by others.

The COURT: I do not think Fagaly's statement as to any possession prior to October 10th is evidence.

COUNSEL FOR PLAINTIFF: Whether brought to the knowledge of plaintiff or not?

The COURT: You have to lay your basis.

COUNSEL FOR PLAINTIFF: We expect, and offer to prove by this

witness the facts that were stated to the court upon his private examination the other day in reference to these various questions.

COUNSEL FOR DEFENDANTS: To which defendants object on the ground that it is not rebuttal, and not material or competent testimony.

The COURT: I sustain the objection as there is no basis laid for it in the way I have indicated.

COUNSEL FOR PLAINTIFF: The question is, as a proposition of law, whether your honor proposes to exclude all evidence offered
419 on the part of plaintiffs tending to prove at what time these defendants actually entered upon and took possession of this lead by the statements and declarations of the parties themselves. If that is true, and that class of evidence is offered and rejected, it is not worth while taking up the time of the court and jury. We offer to prove by witnesses from declarations by Pilkey, Fagaly and Walker that they did take possession of this claim actually, although not openly, long prior to October 10th.

The COURT: I will be willing to rule that way.

COUNSEL FOR DEFENDANTS: I am perfectly willing for the court to rule that way as to the same class of testimony offered to be proved by witness Neeland; is it?

COUNSEL FOR PLAINTIFF: We have nowhere offered that; we have stated evidence of that character we proposed to offer; that is to prove by the statements of these parties themselves that they had actually taken possession of this claim in connection with Pilkey and adversely to plaintiff at some period prior to the 10th of October and, as we claim, in the month of September and that their open possession was a mere device and that they had actually taken possession prior to that time for the purpose of dispossessing plaintiff and that they continued their purpose; all of which we offer as evidence to negative the testimony offered by the defendants that the plaintiff voluntarily abandoned possession of the premises at any time, as well as to show this prior taking of possession by the defendants.

COUNSEL FOR DEFENDANTS: I would like the gentleman to write out and state what evidence he offers and for what purpose in some kind of proposition, and put it on record.

420 The COURT: I will give you by half past one (until after dinner) to state what you propose to prove in writing.

The witness Neeland is withdrawn from the stand.

1.30 P. M.

The following statement in writing is submitted to the court and made a part of this record in connection with the witness Neeland's testimony while on the stand by counsel for plaintiff, which testimony proposed to be offered is objected to by counsel for defendants, which objection is sustained by the court, and to which ruling of the court counsel for plaintiff excepts.

"In connection with the witness, John S. Neeland, now on the stand, we reoffer his testimony as taken before the court upon the

case-in-chief of the plaintiff, and then ruled out; that evidence as taken by the stenographer is offered now in rebuttal; and we also offer the testimony of Mrs. Stella A. Metz, George Blake, B. J. Lohman and Mrs. Ellen L. Lockhart, offering to prove by the said witnesses statements made at different times and places to the said witnesses by Frank Fagaly, Levi Walker, who are now dead, as well as statements of Charles Pilkey, who is now a defendant in this case, which statements of the said three parties, two of whom are now dead, were made prior to October 10th, 1893; and the said statements were and are to the following effect:

That in September, 1893, ore was sent from the Sampson mine by Pilkey, who was then in charge of the Sampson mine for Henry Lockhart and Ben. Johnson, to Levy Walker, which the said
421 Walker had assayed; that thereupon soon afterwards the said Pilkey being in Albuquerque and about the middle of September, the said Walker and Pilkey agreed to take Frank Fagaly into the scheme to obtain possession of the said Sampson mine, and oust the said Henry Lockhart and Ben. Johnson therefrom; that it was then arranged by the three parties named, in the presence of some one or more of the above-named witnesses, that the said Fagaly should accompany the said Pilkey to the Sampson mine for the first time in the month of September, 1893, and did go into possession with the said Pilkey of the said mine in pursuance of the arrangement and conspiracy aforesaid, did exercise acts of ownership and possession and take samples of ore from the said vein, with which he returned to Albuquerque; that thereupon assays were had of the said ore so brought by said Fagaly to Walker and that soon after the return of said assay, which was about $2,600 to the ton, the said Pilkey came to Albuquerque October 2nd or 3rd, 1893, and that it was then arranged, that in view of the large assay, it was necessary to speedily get back upon the said Sampson claim, inasmuch as ninety days would elapse from its location on October 10th, and that on or about the 6th or 7th of October, the said Fagaly and the said Pilkey actually left Albuquerque with the expressed intention of taking actual possession of the said Sampson mine, and did so actually, prior to October 10th, 1893, resume the possession and so take the possession which had been begun when Fagaly first visited said mine in September, and from that taking of actual foot possession prior to October 10th, 1893, they actually so held possession and have continuously held it since."

422 COUNSEL FOR PLAINTIFF: We will now recall Mr. Lockhart, and wish to offer evidence to the jury upon the lines indicated by the court.

Jury recalled into the court-room and in the box.

HENRY LOCKHART.

HENRY LOCKHART, witness for the plaintiff, being recalled, testified as follows:

On direct examination he said:

Q. Did you record the location notices of the Ellen L. Mammoth and Clear Creek mines in the Cochiti country on July 11th, 1893?

A. I caused them to be recorded, yes, sir.

Q. Had the Sampson mine been located on that date?

Objection; not rebuttal; overruled.

A. Yes, sir.

Q. Was the location notice of the Sampson posted on July 11th?

Objection; overruled.

A. I desire to know whether or not I am to answer from personal knowledge or evidence I afterwards received as to that fact?

COUNSEL FOR DEFENDANTS: I ask the court to instruct the witness that he is supposed to answer from his personal knowledge.

COUNSEL FOR PLAINTIFF: I will withdraw that question and ask another.

Q. When did you first see the location notice posted on the Sampson?

A. The latter part of August or about the first of September.

Q. What date did it bear when you saw it?

A. July 10th.

423 Q. Do you of your own knowledge know as a matter of fact when it was posted apart from what was shown by the notice itself or what was said to you by Pilkey?

A. I do not.

Q. How did it come that you recorded those three notices of the Clear Creek, Mammoth and Ellen L. on July 11th?

A. Because they had all been located prior to that time and because there was work done on all of them at that time.

Q. How did you know that fact as to those three claims?

A. By personal examination.

Q. Why was it you did not record the notice of the Sampson claim?

A. Because at that time I had no knowledge of its being located; I was in Albuquerque until July 10th.

Q. Why was it you did not record it within 90 days from July 10th, the date of the location?

A. Because I had not been informed by Mr. Pilkey that the work had been completed on that claim.

Q. You hadn't been there after August 20th, yourself?

A. I have always put the date at the latter part of August, because I am not positive—my impression is I arrived in Albuquerque about the first of September.

Q. At that time of your own knowledge you did not know of the work being done on that claim?

Objection; leading; overruled.

A. I did not.

424 Q. What special agreement, if any, was there between you and Pilkey with reference to knowledge of work upon that claim (objection) and with reference to the recording of this notice?

Objection; because matter already gone into on direct examination of examination-in-chief.

The COURT: I do not remember whether it was on the examination-in-chief or brought out afterwards, but I will sustain the objection upon the ground that it is already in evidence that the witness stated he did not record it because Pilkey had not informed him.

Q. I will ask you whether or not Pilkey did send you any word after you were there in August in regard to work done upon the Sampson claim?

A. He did not.

Q. At what date was it you say you first saw Pilkey after you left him on the Sampson claim in August?

A. On the 2nd day of October, 1893.

Q. What was the date upon which you stated he used that indecent expression about the contract?

Objection; brought out on direct examination in chief.

The COURT: I do not know whether it is preliminary or not but I will allow the question.

A. It was 2 or 3 days after I first saw him, probably about the 5th or 6th to the best of my recollection.

Q. What, if anything, did he say in reference to the Sampson claim upon that occasion?

Objection, because plaintiff went into that conversation fully in chief.

425 The COURT: I sustain the objection. I do not see what this has to do with the line of proof suggested.

COUNSEL FOR PLAINTIFF: I want to examine the witness in regard to the question of abandonment. We want to show that at the utmost interpretation of Mr. Lockhart with reference to the statemen-s of Pilkey was as to the contract generally and not as to any statement of abandonment of any rights to this claim or any claim to which they had a title of any sort; that it was only with reference to the continuance of the contract in force between them.

The COURT: That is all I understood and that is all the witness testified about it.

COUNSEL FOR PLAINTIFF: We want to show precisely what the fact was upon that point.

COUNSEL FOR DEFENDANTS: The witness has already testified there was no work done and he was waiting for information in regard to the work and that he did not record the notice because Pilkey did not notify him, and the evidence is that Pilkey told him he would not have anything more to do under that contract.

COUNSEL FOR PLAINTIFF: This is preliminary to asking the witness whether he at any time abandoned the Sampson mine or had any intention of abandoning it or if there was any intention of abandoning the mine expressed to him by Pilkey.

The COURT: You can ask whether the Sampson was specially mentioned, but I do not see the use of repeating the testimony at large.

Q. Was there ever at this time or on a different occasion, expressed to you by Pilkey any proposition of abandoning the Sampson mine.

Objection as leading; sustained on this ground.

426 Q. What, if anything, was upon that occasion, or any other occasion, ever expressed direct by Pilkey to you in regard to abandoning the Sampson mine?

Counsel for defendants objects, if it is intended to prove any other conversation on that subject other than those gone into in chief, and that the gentleman went into the subject and attempted to show there had been no abandonment of it.

COUNSEL FOR PLAINTIFF: This is in rebuttal of the defense, set up by the testimony on the part of the defendants that there had been an abandonment and that upon this occasion there was an express abandonment of the Sampson mine, which we contend the evidence on the part of the defense does show, and we assuredly should be permitted to negative any such fact.

COUNSEL FOR DEFENDANTS: They should have shown there was no abandonment of the claim, but continuous possession of the claim.

The COURT: They should show facts showing absence of abandonment. You can ask the question if you put it in some way which is not leading.

COUNSEL FOR PLAINTIFF: My last question I do not think is subject to that objection.

The COURT: You can answer it (to witness).

A. There was at that time or no other time any conversation between Mr. Pilkey and me in regard to the abandonment of the Sampson or any other mine; the only thing in connection with it was his assertion when I mentioned the contract that I could stick the contract up my arse: that was the entire conversation relating to the subject whatever of the Sampson or anything else.

Q. State what your intention was in reference to holding or abandoning the Sampson mine.

427 COUNSEL FOR DEFENDANTS: I object. My objection is that neither abandonment nor holding of possession rests upon intention in this case; or when abandonment is determined by the intention of the parties, the intention is to be inferred, not by the declarations of the party but from the facts and circumstances as they existed at the time prior to the trial of the case; and that the witness cannot come here now and declare what his intentions were;

that he is to testify as to the facts and circumstances; that this is not competent evidence his declaration of what his intention was at this time.

COUNSEL FOR PLAINTIFF: The contention of the defense is, an abandonment of the claim at the time they entered upon it, and the intention as they claim, is shown by the testimony of Mr. Pilkey, and the fact as they contend that no work had been done on the Sampson location prior to the date of entry by defendants. Now that abandonment is a question of intention purely is settled by the authorities as distinguished from the question of forfeiture. There are two distinct means by which property which has been once entered upon and acquired under the mining laws may be thrown open to subsequent possession and location; one is forfeiture and the other is abandonment. We expect to show that at this time there was no mining district and no mining district rules in regard to the work to be performed.

The COURT: I thought that had already been shown.

COUNSEL FOR PLAINTIFF: It was in argument and the fact was tacitly admitted. We are offering this testimony to prove that the act of abandonment was not consummated by plaintiff and
428 to refute the testimony of the defense attempting to establish this fact. We ask this question as to what was the intention and purpose of Mr. Lockhart and propose to follow it up by Johnson that there never was on Lockhart's nor on Johnson's part, as part owners with Pilkey, the intention of abandoning this Sampson ground, and it is to go to the jury for what it is worth in connection with the facts and circumstances in the case.

The COURT: The only question in my mind is, the reference in the text books to the intention, at the time, or one that can be testified to without existence at the time.

COUNSEL FOR PLAINTIFF: I cannot see how that can be ascertained without the testimony of the witness, extraneous acts at the time would corroborate, but the declaration of intention of the witness is permissible. We submit that the witness' testimony as to his intention is competent and would be the best evidence if accompanied with acts.

The court overrules objection of counsel for defendants, to which ruling of the court counsel for defendants excepts.

A. There was no intention whatever on my part, whatever, to abandon the Sampson mine. (The stenographer is requested to read over the question in regard to the "holding" part.) My intention in regard to the holding part was: After my conversation with Mr. Johnson and he had informed me of his talk with Mr. Pilkey and his payment of some money to him, and that matters were smoothed over that Mr. Pilkey was going back to complete the work on the Sampson and other claims which had been located.

429 COUNSEL FOR DEFENDANTS: I object to this as not rebuttal and move to strike it out as not rebuttal; they went into that on direct examination.

COUNSEL FOR PLAINTIFF: That was not either responsive to this question.

Counsel for defendants' motion to strike out as to last part of answer, except as to witness' intention in regard to abandonment, is sustained, and all of the witness' answer except as to this part indicated, is stricken out by the court, and plaintiff excepts.

Q. If you had understood from Pilkey on the 5th or 6th of October, or whenever it was, that he had not done any work upon the Sampson and did not intend to do any more work on the Sampson, what could you have done with reference to getting the work done yourself?

Objection as leading and improper and not in rebuttal, but part of plaintiff's case-in-chief as to holding the possession of that mine, and "I wish the gentleman would not ask questions of that kind;" I object, upon the ground that it is leading, irrelevant, immaterial and not rebuttal.

The COURT: I sustain the objection upon the ground that it is leading.

Q. Do you know how far it was from Albuquerque to the Sampson mine?

Objection, not rebuttal; overruled.

A. I think it is about 65 or 70 miles.

Q. What were the means of reaching there?

A. In regard to that I am estimating the distance by rail and stage at present, not——

Q. Did you state upon one occasion you reached there the same day you left Albuquerque?

A. I did.

Q. When was that?

A. On the occasion of my first trip up there.

430 Objection. The court holds it is preliminary and overrules objection.

A. I left Albuquerque some time before daylight; I do not recollect the time; the trains left at that time. I went on the train to Thornton where Mr. Pilkey had two saddle ponies ready and arrived on the ground now known as the Ellen L. a little before sundown; probably about 4 or 5 o'clock.

Q. How came the horses to be ready there at Thornton?

(Objection; overruled.)

A. I notified Mr. Pilkey I would be up on that day and he had arranged to meet me there with the horses on the arrival of the train.

Q. What did you carry upon that occasion?

A. I carried a pair of blankets.

Q. I will ask you what length of time would be necessary to reach this mine with supplies, powder, and other necessaries to work the

claim, from Albuquerque, without any previous arrangement having been made, and to do the work.

A. It would depend to some extent as to how soon you could employ miners to do the work. As to the time for making the distance after you had procured your supplies and employed your men, I agree with Mr. Pilkey, about three days probably.

Q. Why was it you did not attempt to do this after this conversation with Pilkey?

Objection; overruled; exception.

A. Because I had supposed——

Counsel for defendants objects to witness' supposition, and the court says:

The COURT: Just tell what information you had.

A. My information and belief was that Mr. Pilkey had gotten over his dissatisfaction with Mr. Johnson and myself and
431 had proceeded or agreed to proceed back to the camp to complete the work under his agreement, and I had no information to the contrary until after the expiration of the time of our location notice on the Sampson.

Q. Had you any information from Pilkey as to how much had been done upon the Sampson prior to that time?

A. None whatever, because neither of the claims in our conversation was mentioned, the names of any claims.

Q. In regard to the amount of work done upon the——

Objection; leading.

Q. Do you know where Pilkey—after that conversation on the 6th of October, when this difficulty occurred—where, as a matter of fact, he did go.

COUNSEL FOR DEFENDANTS: Of your own knowledge, of course.

COUNSEL FOR PLAINTIFF: Whether he knows it by the means by which human knowledge is attained, he is not restricted to showing he actually went with him and was with him on the ground, but we submit if he answers he does, it will be competent to show how he knows it, and if corroborated by statements made by Pilkey, Fagaly or Walker that Pilkey did then and there go up on this ground in question, that that is competent evidence. The question now is does he know it.

The COURT: You can answer as to your own knowledge, Mr. Lockhart.

A. I know where he went, but I do not know of my own personal knowledge.

Q. Where did he go?

Objection; sustained.

COUNSEL FOR PLAINTIFF: He answered he does know.
432 That resolves itself into the question whether a partie's acts can be proved by his own statements; otherwise, it is not in human power to prove facts in certain cases and the defense can

place the opposite party in the situation we are now. It is certainly competent to prove facts by declarations and admissions against the interest of the party.

The COURT: It is hearsay evidence.

COUNSEL FOR PLAINTIFF: It would be hearsay if somebody else told Lockhart what Pilkey said; but we propose to show what Pilkey said. We propose to prove by statements made by the parties to this suit, not by third persons coming within the rule of hearsay.

The COURT: How would it affect the question of intention if Lockhart did not know that Pilkey went up there?

COUNSEL FOR PLAINTIFF: The intention is to prove by the declaration of the parties that they had taken possession of the Sampson mine before the period the location notice indicates. The location notice of the Washington bears date October 23rd, and we propose to prove as a matter of fact that they entered upon this ground before the 10th. of October; and we submit that ouster can be accomplished without knowledge on the part of the person ousted; we can show possession in fact.

The COURT: I do not see how that cuts any figure in this case, and it has been argued and reargued and I have not brought my mind to the point as to its relevancy yet.

COUNSEL FOR PLAINTIFF: Your attention has not been called to the fact that the fact of taking actual possession of property need not be brought to the knowledge of the person to constitute
433 ouster. There has been no argument before the court on that proposition; it is a separate one from the one we have been considering.

The COURT: The ouster has been admitted in this case, and that does not affect the question of intention, or recovery or no recovery. I sustain the objection.

COUNSEL FOR PLAINTIFF: I desire to ask the following question to save the record.

The COURT: Very well.

Q. Where did he go at the time in question, October 5th or 6th; where did he go?

Objection; sustained, and counsel for plaintiff excepts to the ruling of the court and states he proposed to prove by the admissions and declarations of Pilkey and Fagaly themselves and each of them that at that time they did go to the Sampson mine and take possession of it, and excepts to the ruling of the court in not being permitted to prove this.

On cross-examination he said:

Q. When was the assessment-work done on the Ellen L.?

A. There had been some work done before I went up there, the latter part of June or the first of July.

Q. How much?

A. I do not remember how much.

Q. 10 feet?

A. No, sir.

BENJAMIN JOHNSON.

BENJAMIN JOHNSON, witness for the plaintiff, being sworn, testified as follows:

On direct examination he said:

Q. You were a witness for the defense here the other day?

434 A. Yes, sir.

Q. I will call your attention to the conversation you testified to between yourself and Charles Pilkey, and at which I believe Mr. Skinner was present?

A. Yes, sir.

Q. What, if anything, was said at that time with reference to abandonment of the Sampson claim under location made by Pilkey, Johnson and Lockhart?

COUNSEL FOR DEFENDANTS: The gentleman had the witness on the stand and questioned him fully on that and had a chance to put his testimony in.

COUNSEL FOR PLAINTIFF: We make him our witness now to prove affirmative matters.

The COURT: I understood him to go into this conversation as fully as the witness could remember and I sustain the objection.

Q. What was at that time or at any time your intention as co-owner of the Sampson as to abandoning the claim or working it?

Objection, but afterwards withdrawn.

A. I never abandoned anything, or it, the Sampson.

Q. What was your intention in regard to abandonment?

A. I never had any intention of abandoning it.

Q. You made a deed of your interest to Henry Lockhart?

Objection; overruled.

A. I made a deed to Henry Lockhart a good deal later on than the time of that conversation.

Q. Why did you make a deed of your interest to Lockhart?

Objection; sustained by the court, because fully gone into.

435 COUNSEL FOR PLAINTIFF: As I understood, at the time Johnson was here as defendants' witness he said at that time there were several reasons why he made the deed. The evident purpose of that bears upon the question of abandonment and will be used by the defense to show that Johnson intended to abandon and the defense will argue to the jury that the witness intended to abandon, and the purpose of this question is to show he had no intention of abandoning the claim.

The COURT: He stated his reasons the other day.

COUNSEL FOR PLAINTIFF: He did not mention all his reasons, and we recall him as our witness and to prove by that deed there was no abandonment of the Sampson mine as far as he is concerned.

The COURT: I do not think I ought to allow it when it has been gone into. I sustain the objection.

Q. In further explanation—have you any further explanation to make as to your statement as to your reasons for making the deed to your one-third interest in the Sampson to Henry Lockhart in addition to those reasons you stated?

A. I can state one other reason. (Objection, but immediately withdrawn.) There was one reason I made the deed to Mr. Lockhart, that was I was in debt some and I was afraid it would be jumped on before I got in shape to pay it; and afterwards I saw Mr. Childers one day and I was talking to him and he told me it was not necessary to do that, that I had been in this territory long enough; they could not do anything, anyway.

Q. You had not had the benefit at the time you made this deed of Mr. Childers' legal knowledge—that you give as a reason in addition to what you mentioned the other day, I understand you?

A. Yes, sir; that is all the reason I ever had.

436 Q. After that conversation with Pilkey that you have referred to—I think you said that was October 6th, 1893?

A. It was along in the fore part of the month; the latter part of the first week in the month.

Q. About the 6th?

A. Along about that time, I do not recollect the dates.

Q. Do you know as a matter of fact where Pilkey then went immediately after that conversation?

COUNSEL FOR DEFENDANTS: I object. They cross-examined the witness the other day and attempted to prove it and I objected to it and the court ruled it out, and I object to it now.

COUNSEL FOR PLAINTIFF: I admit this is substantially the same I asked Mr. Lockhart.

THE COURT: I sustain it on the ground of knowledge subsequently acquired.

COUNSEL FOR PLAINTIFF: I will state to your honor we expect to prove that he acquired the knowledge of the fact that Fagaly and Pilkey immediately after this conversation went up and took possession of this mine in question by declarations of these two parties themselves, Fagaly being dead now.

Objection sustained, and plaintiff excepts.

After counsel announces no cross-examination jury leaves the box.

No cross-examination.

Jury withdrawn.

Counsel for plaintiff renews his offer of proof as contained in the written statement of what he proposes to prove, which has already been embodied in the record.

437 Counsel for defendants objects upon the ground that it is incompetent, irrelevant and immaterial and because the witness Pilkey's attention was not called to any of the conversations by which it is proposed to contradict him.

COUNSEL FOR PLAINTIFF: We attempted to ask Mr. Pilkey as to the statements he made and it was ruled out as not proper cross-examination. This statement (the written statement referred to) is

offered upon the general ground of the admissibility of this class of testimony, by the declarations of deceased persons and parties in interest, against interest, and living parties, against interest, generally; not for the purpose of impeaching specifically particular testimony of the witness Pilkey which is not true, and if we did not interrogate him with reference to this particular conversation because we were under the belief the evidence was admissible on the other ground, against interest, then we ask the indulgence of the court to place Pilkey on the stand, if that is the view of the admissibility of this testimony in order to lay the foundation for this direct impeaching testimony.

COUNSEL FOR DEFENDANTS: I further object because it is not in rebuttal.

The COURT: If there is any question of a man's right being affected by an inadvertence, it is a question within the discretion of the court, and the principle I have been going on generally is to exercise that discretion, and let the witness go on the stand.

COUNSEL FOR PLAINTIFF: It was omitted on the belief on the part of counsel that it was not necessary, it being admissible upon the general ground of evidence in rebuttal, and it was an inadvertence on our part in failing to lay the foundation as to par-
438 ticular statements and conversations and we ask the indulgence of the court to be permitted to do so at this time.

COUNSEL FOR DEFENDANTS: When they wanted to ask Pilkey in regard to certain conversations they laid the foundation in that instance and could have done so in this.

The COURT: You cannot lay the foundation to impeach a witness as to evidence that would be ruled out, unless for the purpose of making up the record. You cannot bring in rebuttal evidence upon laying the foundation upon an immaterial matter.

COUNSEL FOR PLAINTIFF: One of the grounds the defense urge is that there has been no foundation laid.

COUNSEL FOR DEFENDANTS: The court says he does not rule it out on that ground, and we withdraw our objection as to that part as to not laying the foundation.

The COURT: The theory I have of this case is, that all these things are not admissible because they do not appear to have been known to the plaintiff at the time or to have affected his conduct upon the question of abandonment. And I sustain the objection on that ground. The record can be made up on my rulings from the stenographer's notes.

COUNSEL FOR PLAINTIFF: I have authorities, but if your honor has your mind definitely made up I do not care to take the time.

The COURT: I am willing to listen and take a back track if I am convinced that I am wrong.

Counsel for plaintiff submits authorities to the court in support of his position, and the written statement of what he proposes to prove is dictated to the stenographer, but which has already
439 been set out in the record, and not here again transcribed.

I therefore, upon the motion of the defendants, instruct the jury to find for the defendants.

To which ruling of the court upon said motion, counsel for plaintiff excepts, and gives notice of motion for new trial.

This was all the testimony in the case.

Hearing on Motion for New Trial.

SATURDAY, *March* 21*st*, 1896.

Counsel for defendants makes a formal motion that the motion for new trial be stricken from the record because not filed within five days after notice of motion for new trial given.

Which said motion is overruled by the court and counsel for defendants excepts to the ruling of the court.

Counsel for plaintiff offers the affidavits of the following parties in support of motion for new trial:

H. B. Fergusson, Mrs. Ellen L. Lockhart, Manuel Hurtado, Henry Lockhart, Feliciano Montoya (1), Feliciano Montoya (2), Pacifico Baca, Gregorio Mora, Mariano Otero, Fredrico Otero, Antonio Lucero Lopez, Natividad Arquero and George Ostrander.

Counsel for defendants objects to said affidavits upon the ground that they were not filed within five days after notice of filing motion for new trial.

Which said objection is overruled by the court and counsel for defendants excepts to the ruling of the court.

Counsel for defendants offers the following counter-affidavits and documentary evidence in opposition to plaintiff's motion for a new trial:

440 Affidavits of W. B. Childers, with copy of Salvador Arquero, Charles Pilkey, H. C. Leeds, Philip O'Bannon, Charles Greenwood, N. L. Bletcher, F. B O'Bannon, —— Rogers, Mrs. Metz, letters to H. C. Leeds, marked Exhibits "A," "B" and "C;" Mrs. Metz, affidavit in cause No. 4275; Henry Lockhart's affidavit in cause No. 4275; part of bill in cause No. 4275; additional affidavit of W. B. Childers; affidavit of Mary Heacock.

To which counsel for plaintiff objects as incompetent, irrelevant and inadmissible because affidavits of plaintiff cannot be combatted or disputed by same, but must be taken as indisputable proof as newly discovered evidence for the purposes of this motion, and counsel for plaintiff objects to each and every one of said counter affidavits and other documentary evidence offered as incompetent and irrelevant, as stated, for the purposes of this motion for a new trial; and specifically objects to the affidavit of W. B. Childers and the affidavit made before Feliciano Montoya purporting to be made by one Salvador Arquero as not the affidavit of Salvador, who is dead, upon the ground that the additional affidavit of W. B. Childers is hearsay and upon the same ground as to Arquero's affidavit; and in addition objects to those affidavits filed today without notice to opposite party, the same being the affidavits of W. B. Childers, Chas. Pilkey, H. C. Leeds and Exhibits "A," "B" & "C" attached thereto, Philip O'Bannon, F. B. O'Bannon, Chas. Greenwood, N. L. Bletcher and Rogers.

Which said objection to the introduction of the above affidavits and documentary evidence is overruled by the court and counsel for plaintiff excepts.

Said affidavits and documentary evidence introduced and read.

441 Which said affidavits and documentary evidence are made a part of this record on the hearing of the motion for a new trial, are marked "Defendants' Evidence on Motion for New Trial" and hereto annexed.

Counsel for plaintiff offers in evidence the answers of Julia Johnson, J. A. Johnson, H. C. Leeds, and the separate answer of Lee Walker, which were introduced in evidence on the trial of this case and marked Exhibits "10" and "12." Same are introduced and reference is here made to said exhibits already copied in the record.

MONDAY, *March 23rd*, 1896.

The court reads his opinion overruling plaintiff's motion for a new trial, which follows on the next page. And by agreement of counsel on both sides, with the concurrence of the court, the same is made a part of the record in this case.

After the reading of the opinion by the court overruling the motion for new trial, counsel for plaintiff excepts to the order of the court and gives notice of writ of error in the cause.

TERRITORY OF NEW MEXICO,
County of Bernalillo.

In the District Court, Second Judicial District.

HENRY LOCKHART, Plaintiff, *vs.* JAMES Q. WILLS, H. C. LEEDS, J. A. JOHNSON, and Julia A. Johnson, His Wife; Charles Pilkey, Samuel Dunlap, The Heirs and Legal Representatives of Lee Walker, Deceased; William B. Childers, Edward W. Dobson, and Charles Bonsall, Receiver, Defendants.	No. 4273.	Ejectment.

Plaintiff moves the court to set aside the verdict, and for a new trial in the above-entitled cause, and for grounds of this

442 motion assigns the following causes:

1. The court erred in directing the jury to return a verdict for the defendants, when the same should have been for the plaintiff, upon the evidence.

2. The court erred in admitting improper and incompetent evidence on the part of the defendants, against plaintiff's objection.

3. The court erred in excluding from the jury legal, competent, and proper evidence offered on the part of the plaintiff.

4. The court erred in refusing to admit the evidence of H. B. Fergusson, John S. Neeland, B. J. Lohland, Stella A. Metz, George

Blake, and Ellen L. Lockhart, respectively, offered by the plaintiff, as heard by the court in the absence of the jury, and as set forth in the written offer of evidence on behalf of the plaintiff on file in this cause and which evidence and offer of evidence, are referred to and made a part of this motion.

5. The court erred in refusing to admit legal, competent, and proper evidence offered on the part of the plaintiff tending to prove that at the time of the commencement of this action the defendants were in the possession of the premises described in plaintiff's declaration, and that the plaintiff had a right to the possession thereof.

6. The court erred in rejecting legal, competent, and proper evidence offered on behalf of the plaintiff, tending to prove that Charles Pilkey was in the possession of the premises mentioned in plaintiff's declaration as a tenant in common thereof, with the plaintiff, and wrongfully ousted the plaintiff from possession thereof as such tenant in common before the commencement of this action, and
443 that said Pilkey and his codefendants herein unlawfully withheld such possession from the plaintiff, from the time of such ouster, and at the time of the commencement of this action.

7. The court erred in refusing to admit to the jury the evidence of H. B. Fergusson as given before the court in the absence of the jury, and which evidence is hereby referred to and made a part of this motion, tending to prove declarations and statements made by Frank Fagaly, deceased, in his lifetime to the witness, upon the ground that such declarations and statements were made by said Fagaly to said witness as his attorney and were privileged communications not properly admissible in evidence on behalf of the plaintiff in this case.

8. The verdict returned by the jury is against the law and the evidence.

9. And for further cause the plaintiff states that since the trial herein and without any previous neglect on his part the plaintiff has discovered new and material evidence, which is not cumulative, and which will tend to prove by witnesses of the actual fact that said Charles Pilkey together with his codefendants herein wrongfully and unlawfully ousted the plaintiff and wrongfully and unlawfully withheld from the plaintiff as a tenant in common with the said Pilkey, the possession of the said premises as alleged in plaintiff's declaration, and that plaintiff will procure the testimony of said witnesses in time to be heard upon a new trial herein, and plaintiff has been unable to procure the affidavits of said witnesses as to said facts in time to file with this motion, and asks leave to file his affidavit and the affidavits of said witnesses in support hereof, within a reasonable time, before the hearing of this motion.

WARREN, FERGUSSON & GILLETT,
Att'ys for Plaintiff.

444 And for as such as the foregoing matters do not appear of record in the above cause, the defendant and appellant prays the court to allow, sign and seal this, his bill of exceptions, and make

the same a part of the record in this cause, which is accordingly done this 20th day of March, 1897.

N. C. COLLIER, *Judge.*

TERRITORY OF NEW MEXICO, } ss:
County of Bernalillo, }

Second Judicial Court.

I, O. N. Marron, clerk of the district court of the second judicial district of the Territory of New Mexico, within and for the county of Bernalillo, do hereby certify that the above and foregoing is a true and correct transcript of parts of the record and proceedings had in the cause lately pending in the said district court for the county of Bernalillo, wherein Henry Lockhart was the plaintiff and J. Q. Wills, H. C. Leeds, J. A. Johnston and Julia A. Johnston, his wife, Charles Pilkey, Samuel Dunlap, The Unknown Heirs of Lee Walker, deceased, William B. Childers, Edward W. Dobson and Charles Bonsall, receiver, were defendants, as the same appears of record and from the files in my office, being so much and such part thereof as the plaintiff in error deems necessary for a review of the judgment and decree rendered therein, as the same remains of record in my office.

In witness whereof, I have hereunto set my hand
[COURT SEAL.] and fixed the seal of the said court this 26th day of May, A. D. 1897.

O. N. MARRON, *Clerk.*

445 And afterwards, on, to wit, the 27th day of July, A. D. 1897, there was filed in the office of the clerk of the supreme court of the Territory aforesaid an assignment of errors; which said assignment of errors is in words and figures as follows, to wit:

In the Supreme Court of the Territory of New Mexico, July Term, 1897.

HENRY LOCKHART, Plaintiff in Error, } No. 716. Error to
vs. Bernalillo County.
J. Q. WILLS ET AL., Defendants in Error. }

Assignment of Errors.

Now comes Henry Lockhart, the plaintiff in error in the above-entitled cause, and assigns the following errors appearing in the record herein, viz:

1. The court erred in admitting improper and incompetent evidence against the objection of plaintiff below.

2. The court erred in excluding material, competent, and proper evidence offered by the plaintiff below.

3. The court erred in instructing the jury to find a verdict for the defendants below.

4. The court erred in refusing to submit the issues of fact in said cause to the jury.

5. The court erred in determining the issue of alleged abandonment of the premises by plaintiff below as a question of law when the same was a question of fact, and in determining the same against the plaintiff below upon the evidence, and in refusing to submit the same to the jury.

6. The court erred in denying the motion of plaintiff below for a new trial of said cause.

7. The plaintiff below was denied a fair and impartial trial. Wherefore, and for divers other errors appearing in said record, the
446 plaintiff in error prays that the judgment below in said cause be in all things reversed and set aside, and that such further proceedings be had therein as may be agreeable to law.

WARREN, FERGUSSON & GILLETT,
Attorneys for Plaintiff in Error.

And afterwards, to wit, at a regular term of the supreme court of the Territory of New Mexico, begun and held at Santa Fé, on the last Monday of July, 1897, the same being the 26th day of July, A. D. 1897, on the eleventh day thereof, the same being Friday, the 6th day of August, A. D. 1897, the following, among other, proceedings were has as follows, to wit:

HENRY LOCKHART, Plaintiff in Error,
vs.
J. Q. WILLS ET AL., Defendants in Error. } No. 716. Error to Bernalillo County.

On motion, it is ordered that this cause be, and the same is hereby, reset for August 10th, 1897.

And afterwards, to wit, at said regular term of the supreme court of the Territory of New Mexico, on the fifteenth day thereof, the same being Thursday, the 11th day of August, 1897, the following, among other, proceedings were had as follows, to wit:

HENRY LOCKHART, Plaintiff in Error,
vs.
J. Q. WILLS ET AL., Defendants in Error. } No. 716. Error to Bernalillo County.

This cause coming on to be heard on the transcript of record, assignment of errors, and briefs of counsel on file, the court hears a portion of the argument of counsel.

447 And afterwards, to wit, at the said regular term of the supreme court of the Territory of New Mexico, on the sixteenth day thereof, the same being the 12th day of August, A. D. 1897, the following, among other, proceedings were had as follows, to wit:

HENRY LOCKHART, Plaintiff in Error,
vs.
J. Q. WILLS ET AL., Defendants in Error.
No. 716. Error to Bernalillo County.

This cause, coming on to be heard on the remainder of the argument of counsel, is heard by the court and is submitted to and taken under advisement by the court, it not being sufficiently advised in the premises.

And afterwards, to wit, at the said regular term of the supreme court of the Territory of New Mexico, on the sixteenth day thereof, the same being the 12th day of August, A. D. 1897, the following, among other, proceedings were had as follows, to wit:

HENRY LOCKHART, Plaintiff in Error,
vs.
J. Q. WILLS ET AL., Defendants in Error.
No. 716. Error to Bernalillo County.

Now comes the defendants in error, by their attorney, W. B. Childers, Esq., upon the conclusion of plaintiff's in error opening argument and before the argument for defendants in error had been commenced, *and* files a motion to dismiss the writ of error in said cause because the printed transcript filed in said cause is not a true, correct, and complete copy of the original returned by the clerk of the court below, and supports the same by affidavit that he had just discovered that the motion for a new trial made in said cause was not incorporated in the bill of exceptions returned by the clerk of the district court, but appears in the printed transcript as
448 a part of the bill of exceptions; and thereupon, after defendants in error *has* made said motion to dismiss said writ of error, the plaintiff in error, by his attorney, H. L. Warren, Esq., filed a motion in said cause to reverse the judgment of the court below and remand the cause for a new trial because defendants in error had failed to file any written joinder to plaintiff's in error assignment of errors. Whereupon the court took said motions under advisement, and held that the argument of said cause should proceed without prejudice to the parties to said motions. The court further ordered that a writ of certiorari issue to the clerk of the court below, commanding him to certify and send up to this court all the original papers on file therein, including the original bill of exceptions and all affidavits and other papers referred to therein.

And afterwards, to wit, on the 17th day of August, A. D. 1897, there was filed in the office of said clerk of said supreme court a joinder in errors; which said joinder in errors is in words and figures as follows, to wit:

In the Supreme Court of the Territory of New Mexico.

HENRY LOCKHART, Plaintiff in Error, *vs.* J. Q. WILLS ET AL., Defendants in Error.	No. 716.	Error to Bernalillo County.

Now comes the defendants in error and files *his* joinder in error to the assignments of error filed by plaintiff in error, and says that there is no error in the record, the matters assigned by the plaintiff in error as error.

W. B. CHILDERS,
Attorney for Defendants in Error.

Santa Fé, N. M., August 16th, 1897.

449 And afterwards, on, to wit, at the said regular term of the supreme court, on the twenty-ninth day thereof, the same being Saturday, October 2nd, A. D. 1897, the following, among other, proceedings were had as follows, to wit:

HENRY LOCKHART, Plaintiff in Error, *vs.* J. Q. WILLS ET AL., Defendants in Error.	No. 716.	Error to Bernalillo County.

This cause having been argued by counsel and submitted to and taken under advisement by the court upon a former day of the present term, the court, being now sufficiently advised in the premises, announces its decision by Associate Justice Hamilton, Chief Justice Smith and Associate Justices Laughlin and Bantz concurring, reversing the judgment of the court below and remanding this cause for a new trial for reasons stated in the opinion of the court on file. It is therefore considered and adjudged by the court that the judgment of the district court in and for the county of Bernalillo, whence this cause came into this court, be, and the same hereby is, remanded to said district court for a new trial, and it is further considered by the court that the plaintiff in error herein do have and recover of the said defendants in error his costs in this behalf expended, to be taxed, for which let execution issue.

And afterwards, on, to wit, the 2nd day of October, A. D. 1897, there was filed in the office of the clerk of said supreme court the opinion of the court; which said opinion is in words and figures as follows, to wit:

In the Supreme Court of the Territory of New Mexico, July Term, A. D. 1897.

450 HENRY LOCKHART, Plaintiff in Error, }
vs. { No. 716. Error to
J. Q. WILLS ET AL., Defendants in Error. } Bernalillo County.

Opinion of the Court.

HAMILTON, *A. J.:*

This is a suit in ejectment brought here from the district court of Bernalillo county, in the second judicial district.

At the conclusion of the evidence the court, at the instance of the defendants, directed a verdict in their favor. From this action of the court in giving such instruction and taking the case from the jury this writ of error is prosecuted.

The errors assigned are:

1. The action of the court in refusing to submit the cause to the jury under the evidence admitted.

2. The improper exclusion of certain evidence offered by the *the* plaintiff and the admission of certain evidence on behalf of the defendants.

The first question, therefore, is: Did the court commit error in refusing to submit the cause to the jury under all of the evidence which it had allowed to be offered in the case? The court has the right, and it is its duty, to withdraw a case from the jury and direct a verdict if the evidence in the case is undisputed or if the evidence is so conclusive that the court would set aside a verdict if rendered in opposition to it.

Richardson *vs.* Boston, 19 How., 263.
Delaware, &c., R'y Co. *vs.* Converse, 139 U. S., 469.
Ellis *vs.* R'y Co., 150 U. S., 243.

Does the case before us come within either of the rules above stated?

The testimony offered in the case and submitted by the court to the jury tended to establish that the plaintiff, one Charles
451 Pilkey, and one Benjamin Johnson entered into a written agreement, signed and executed by each of them on the 7th day of May, A. D. 1893, whereby it was agreed that the said first party, Charles Pilkey, should prospect for and locate such veins, lodes, and placers as he might discover or know the existence of containing valuable ores and minerals in the name of and for the joint benefit of all parties hereto, in the proportion of a one-third interest to said first party, Charles Pilkey, and an undivided two-thirds interest to said second parties, being the plaintiff and the said Johnson. It was further provided in said agreement that the said second parties, to wit, the plaintiff and said Benjamin Johnson, should furnish certain supplies and material to the said Pilkey while he was engaged in prospecting, locating, and working said mines, which was fully set forth in the agreement. The execution of this agree-

ment is admitted by both the plaintiff and the defendants. It is further established by the testimony that, under this agreement, the said Pilkey, after having received his supplies from the plaintiff and the said Johnson, went into the Cochiti mining district and located certain mines therein, among which is the claim in controversy in this suit, known as the Sampson location. It is established by the testimony, both by the plaintiff and the defendants, that this location of the Sampson mine was made on the 10th day of July, 1893, by posting a notice in a conspicuous place upon said claim, containing a description of the grounds located, and signed by the plaintiff, Benjamin Johnson, and Charles Pilkey. The evidence also tended to show that the plaintiff in this cause and the said Benjamin Johnson complied with their part of the said agreement by furnishing the supplies and material to the said Pilkey while he was engaged in such work of prospecting for and locating said property.

The testimony of the plaintiff tended to establish that he visited said property after it was located and did some prospecting thereon; that it was arranged between him and Pilkey that the assessment-work should be done before the expiration of the 90 days from the date of the posting of said notice; that he had various assays made from samples taken from the ledge; that he had some correspondence with Pilkey, and gave direc-
452 tions and instructions to Pilkey from time to time to have the assessment done; that Pilkey was on or near the ground doing the assessment upon other property which he had located under said agreement on behalf of the plaintiff Johnson and himself, and it was understood that Pilkey should complete this assessment within the time provided by law. His testimony further tended to establish that he, with Pilkey or through Pilkey, had continued in possession of this ground up to the time that it was taken possession of by the defendants and located by them; that he never had any intention whatever of giving up or abandoning the ground, but always intended to hold and work it. The testimony of another witness in the case tended to show that Pilkey was in possession of the ground in conjunction with and for the plaintiff Lockhart and Johnson and himself. The contention of the defendant is that no work had been done upon this mine after its location and after the posting of the notice, so as to hold it under the laws of the United States, and their contention is that the plaintiff had wholly abandoned the claim prior to the time the defendants took possession and located the ground under the name of the Washington mine.

The testimony on behalf of the defendants tended to show that after the mine was located and the notice posted no assessment-work was done upon the property; that no ten-foot hole was sunk and that the claim was not monumented in the manner required by law, and that in fact no work was done thereon by either Pilkey or the plaintiff Lockhart. The testimony further tended to establish that about the 3rd or 5th of October, 1893, five or seven days before the expiration of the 90 days within which they were required to do the work and record the notice under the laws of the United States, Pilkey notified the plaintiff and Johnson that he would have noth-

ing further to do with the property and would abandon the contract which had been entered into, so far as he was concerned. Under the testimony which was offered to the jury and admitted by the court, both on behalf of the plaintiff and the defendants in the case, the question of the abandonment of the possession of the mine by the plaintiff was directly in issue. The testimony offered
453 and the rulings of the court upon the testimony which was both admitted and rejected show that this was the real issue to be submitted to the jury.

The question as to whether the testimony introduced and admitted by the court established the fact that the claim was discovered and taken possession of by the plaintiff and his cotenants, Pilkey and Johnson, and as to whether the plaintiff continued in such possession until he was ousted therefrom by the defendants, or as to whether the plaintiff abandoned such possession, are questions of fact which should have been determined by the jury under proper instructions from the court. Where the testimony tends to the establishment of facts from which the inference of abandonment or want of abandonment may be drawn, then the jury, and not the court, must determine these facts and draw the inferences from the testimony offered. Abandonment is a question of act as well as intent, and it is also said that it is a question of mixed law and fact.

See Oreamuno *vs.* Uncle Sam. G. & S. Mining Co., 1 Nev., 188.

Weill *vs.* Lucerne Mining Co., 11 Nev., 200.

A party's own testimony that he did not intend to abandon is not conclusive upon the jury. The intention to abandon must be determined by the jury from all the facts and circumstances in the case.

Meyer *vs.* Spooner, 55 Calif., 257.

Even though it might be shown that Pilkey had repudiated the contract and had, so far as he was concerned, abandoned and given up the mine and so notified his tenants in common, Johnson and the plaintiff, yet the existence of this fact alone would not necessarily be construed into an abandonment of the property by the plaintiff. The plaintiff having denied his abandonment and insisted upon his possession, the question should have been submitted to the jury.

My opinion, therefore, is that it was error for the court, in the face of the evidence admitted, to direct a verdict and refuse to submit the cause to a jury.

The next error assigned is the improper exclusion of certain evidence offered by the plaintiff. It was contended by the plaintiff on the trial that after the location of the mine and while the
454 same was in possession of the plaintiff and before the time had expired within which he might do the work and file and record the notice and perfect his location, as required by the United States statutes; that Pilkey, the other tenant in common with the

plaintiff, entered into a fraudulent conspiracy with one Fagaly and one Walker and other defendants to obtain possession of the mine, and that as a result of this fraudulent collusion Pilkey and the other defendants ousted the plaintiff from the possession of the mine and fraudulently took and held and still hold possession thereof from the plaintiff. In support of this contention the plaintiff on the trial made and tendered the following offer of proofs, as found on pages 418 and 419 of the record:

"In connection with the witness John S. Neeland, now on the stand, we reoffer his testimony as taken before the court upon the case-in-chief of the plaintiff, and then ruled out; that evidence, as taken by the stenographer, is offered in rebuttal; and we also offer the testimony of Mrs. Stella A. Metz, George Blake, B. I. Lohman, and Mrs. Ellen Lockhart, offering to prove by the said witness-statements made at different times and places to the said witness-by Frank Fagaly, Levi Walker, who are now dead, as well as statements of Charles Pilkey, who is now a defendant in this case, which statements of the said three parties, two of whom are now dead, were made prior to October 10th, 1893; and the said statements were and are to the following effect:

"That in September, 1893, ore was sent from the Sampson mine by Pilkey, who was then in charge of the Sampson mine for Henry Lockhart and Ben. Johnson, to Levy Walker, which the said Walker has assayed; that thereupon soon afterwards, the said Pilkey being in Albuquerque, and about the middle of September, the said Walker and Pilkey agreed to take Frank Fagaly into the scheme to obtain possession of the said Sampson mine and oust the said Henry Lockhart and Ben. Johnson therefrom; that it was then arranged by the three parties named, in the presence of some one or more of the above-named witnesses, that the said Fagaly shoul- accompany the said Pilkey to the Sampson mine for the first time in the month of September, 1893, and did go into possession with the said
455 Pilkey of the said mine in pursuance of the arrangement and conspiracy aforesaid; did exercise acts of ownership and possession and take samples of ore from the said vein, with which he returned to Albuquerque; that thereupon assays were had of the said ore so brought by said Fagaly to Walker, and that soon after the return of said assay, which was about $2,600 to the ton, the said Pilkey came to Albuquerque, October 2nd or 3rd, 1893, and that it was then arranged that in view of the large assay it was necessary to speedily get back upon the Sampson claim, inasmuch as ninety days would elapse from its location on October 10th, and that on or about the 6th or 7th of October the said Fagaly and the said Pilkey actually left Albuquerque, with the expressed intention of taking actual possession of the said Sampson mine, and did so actually, prior to October 10th, 1893, resume the possession and so take the possession which had been begun when Fagaly first visited said mine in September, and from that taking of actual foot possession prior to October 10th, 1893, they actually so held possession and have continuously held it since." Which offer was denied by the court and the evidence rejected. The contention of the defendants

was that there was no wrongful ouster of the plaintiff, but that at the time the defendants entered into possession of the mine and located the same and for a long time prior thereto the mine had been wholly abandoned by the plaintiff and his associates, and therefore the possession and location by the defendants was rightful. The issues of fact, therefore, between the plaintiff and the defendants as to the possession of the plaintiff, his wrongful ouster therefrom by the defendants, his abandonment of the mine, and their rightful possession and location thereof, were thus clearly and distinctly presented. Therefore any competent testimony which would tend to establish any of these issues was clearly proper and should have gone to the jury.

If the plaintiff was rightfully in possession of the mine and seeking to hold it, and the time had not expired within which he was allowed to do the work and perfect his location, and if during this time the defendants wrongfully intruded upon his possession and ousted him from the mine, then the plaintiff could not be
456 charged with abandonment. Abandonment cannot be charged against the locator of a claim if, while he is in possession, his claim has been seized by another who holds the possession of it adversely to him.

See Utah Mining & Mfg. Co. *vs.* Dickert, 21 Pac. Rep., 1002.

We cannot state, from the condition of this record and the nature of the objections made by the plaintiff in error to the exclusion of the evidence, just what portion of the testimony should have been excluded and what really admitted. The offer was probably much broader than would have been legally admissible. While the evidence as to the statements made by Fagaly and Walker would not, probably, have been competent, yet their acts and conduct, which might tend to show that they, with Pilkey and the other defendants, wrongfully entered upon the possession of the plaintiff and ousted him from the mine before the time had expired within which he could do the work—that is, before the 10th of October, 1897—would be competent and admissible.

As to the evidence offered of the statements of Pilkey, he having located the mine in the name of himself, the plaintiff, and Johnson under the contract, and they all having been in possession of the same, his statements in relation to the possession of the mine by the plaintiff or the abandonment thereof and the formation and consum-ation of any plan by him and the defendants to take possession of the mine for the defendants and oust the plaintiff therefrom would be competent; also the statements made by him, if any, contradictory of his evidence given would be competent if the foundation was laid for it.

The cause must therefore be reversed and remanded for a new trial, and it is so ordered.

H. B. HAMILTON, *A. J.*

We concur:

THOMAS SMITH, *C. J.*
N. B. LAUGHLIN, *A. J.*
GIDEON D. BANTZ, *A. J.*

457 And afterwards, to wit, on the 11th day of October, A. D. 1897, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a motion for a rehearing in the above-entitled cause; which said motion for a rehearing is in words and figures as follows, to wit:

In the Supreme Court of the Territory of New Mexico, July Term, 1897.

HENRY LOCKHART, Plaintiff in Error, *vs.* J. Q. WILLS ET AL., Defendants in Error. } No. 716. Error to Bernalillo County.

Motion for Rehearing.

Now comes the defendants in error, by Childers & Dobson, their solicitors, and move the court for a rehearing in the above cause for the following reasons:

I.

The court failed to pass upon the question as to the admissibility of the testimony of the witness H. B. Fergusson as to the statements made to him by Frank Fagaly, deceased. If the court below is called upon to try this case again, there is nothing in the opinion of the court to guide it as to the admissibilty or rejection of this evidence. Pages 179 to 208 of Transcript of Record.

II.

Because the court in its opinion failed to take into consideration and pass upon the proposition raised by the defendants in error in their brief that the land in controversy was, at the time the locations were made thereon, on the 23rd day of October, 1893, open to location under the mining laws of the United States. For dates of locations see Transcript of Record, pages 23 and 148.

If this contention is well founded, the failure of the plaintiff in error to record his location notice worked a forfeiture of his rights under the location of July 10th, 1893, and defendants in error
458 had a right to go upon the land and locate the claim at any time after the 10th day of October, 1893. Plaintiff in error's location notice was filed for record on the 9th day of December, 1893. See Transcript of Record, page 34.

WILLIAM B. CHILDERS,
Attorney for Defendants in Error.

And afterwards, to wit, at said regular term of the supreme court of the Territory of New Mexico, on the thirty-sixth day thereof, the same being the 11th day of January, A. D. 1898, the following, among other, proceedings were had as follows, to wit:

HENRY LOCKHART, Plaintiff in Error, vs. J. Q. WILLS ET AL., Defendant- in Error. } No. 716. Error to District Court, Bernalillo County.

It is ordered by the court that the motion heretofore filed herein for a rehearing in said cause be, and the same hereby is, granted.

And afterwards, to wit, on the 27th day of July, A. D. 1898, there was filed in the office of the said clerk of the said supreme court a suggestion of deaths of defendants in errort; which said suggestion of death is in words and figures as follows, to wit:

In the Supreme Court of the Territory of New Mexico, July Term, 1898.

HENRY LOCKHART, Plaintiff in Error, vs. J. Q. WILLS ET AL., Defendants in Error. } No. 716. Error to District Court, Bernalillo County.

The plaintiff in error, by H. L. Warren, his attorney, comes and suggests the death of J. Q. Wills and Samuel Dunlap, re-
459 spectively, defendants in error in this cause, and said Warren states and shows unto the court that said named parties, respectively, died, as he is informed and believes, leaving heirs, executors, and representatives, whose names are unknown to affiant, after the assignment of errors in this court by plaintiff in error, and the plaintiff in error moves the court for leave to substitute the respective heirs, executors, and representatives of said deceased, J. Q. Wills and Samuel Dunlap, as defendants in error herein, and that said cause may proceed against them jointly with the other defendants in error herein.

H. L. WARREN,
Attorney for Plaintiff in Error.

TERRITORY OF NEW MEXICO, *County of Santa Fé*, } *ss:*

H. L. Warren, being duly sworn, says that he is one of the attorneys of plaintiff in error in the above-entitled cause, and that the matters and things above stated are true to the best of his knowledge, information, and belief.

H. L. WARREN.

Subscribed and sworn to before me this July 26th, 1898.
[SEAL.] EARNEST A. JOHNSTON,
Notary Public.

And afterwards, to wit, at a regular term of the supreme court of the Territory of New Mexico, begun and held at Santa Fé on the last Monday of July, 1898, the same being the 25th day of July, A. D. 1898, on the fourth day thereof, the same being Thursday, the 28th day of July, A. D. 1898, the following, among other, proceedings were had as follows, to wit:

HENRY LOCKHART, Plaintiff in Error,
vs.
J. Q. WILLS ET AL., Defendants in Error.
} No. 716. Error to District Court, Bernalillo County.

460 Now comes William B. Childers, Esqr., attorney for defendants in error, and suggests to the court the death of J. Q. Wills and Samuel Dunlap, and moves the court to substitute the name of the Washington Gold & Silver Mining Company in lieu of said deceased parties to this suit, and, after hearing argument by counsel for the respective parties hereto, the court grants said motion; and the motion hereinbefore filed herein by plaintiff in error suggesting the death of said defendants is hereby withdrawn by permission of the court.

And afterwards, to wit, at said regular term of the supreme court of the Territory of New Mexico, on the fifth day thereof, the same being Friday, the 29th day of July, A. D. 1898, the following, among other, proceedings were had as follows, to wit:

HENRY LOCKHART, Plaintiff in Error,
vs.
THE WASHINGTON GOLD & SILVER MINING Company *et al.*, Defendants in Error.
} No. 716. Error to District Court, Bernalillo County.

This cause having come to be heard upon transcript of record, assignment of errors, and briefs of counsel on file, the same is argued by H. L. Warren, Esqr., for plaintiff in error, and W. B. Childers, Eqr., for defendants in error, and submitted to the court, and the court, not being sufficiently advised in the premises, takes the same under advisement.

And afterwards, on, to with, at said regular term of the supreme court, on twenty-third day of said term, the same being Tuesday, the 23rd day of August, the following, among other, proceedings were had as follows, to wit:

461 HENRY LOCKHART, Plaintiff in Error,
vs.
THE WASHINGTON GOLD & SILVER Mining Company *et al.*, Defendants in Error.
} No. 716. Error to District Court, Bernalillo County.

This cause having been argued by counsel and submitted to and taken under advisement by the court upon a former day of the present term, the court, being now sufficiently advised in the premises, announces its decision by Associate Justice Frank W. Parker, Chief Justice William J. Mills and Associate Justices J. W. Crumpacker and John R. McFie (Leland, J., did not sit in this case) affirming the judgment of the court below for reasons stated in the opinion of the court on file. It is therefore considered and adjudged by the court that the judgment of the district court in and for the

county of Bernalillo, whence this cause came into this court, be, and the same is hereby, affirmed, and that in accordance therewith it is considered and adjudged by the court that the said motion for a new trial be, and it is hereby, overruled, and that the said plaintiff take nothing by this writ, and that the said defendants go hence without day and recover from the plaintiff their costs herein expended, to be taxed, and that execution issue therefor.

And afterwards, to wit, on the first day of September, A. D. 1898, there was filed in the office of the clerk of the said supreme court a motion of plaintiff in error for a rehearing; which said motion of plaintiff in error for a rehearing is in words and figures as follows, to wit:

462 In the Supreme Court of the Territory of New Mexico, July Term, 1898.

HENRY LOCKHART, Plaintiff in Error,
vs.
J. Q. WILLS ET AL., Defendants in Error. } No. 716.

Motion of Plaintiff in Error for Rehearing.

The plaintiff in error, by Warren & Fergusson, his attorneys, prays the court for a rehearing in the above-entitled cause, and respectfully shows unto the court the following grounds for this petition, viz:

I.

This court decides, in the opinion filed herein, that, "there being no reservation of these lands within claimed grants in New Mexico, by treaty, law or authorized act of the executive department of the government, we conclude that they are not reserved lands,
463 and are 'lands belonging to the United States,' within the meaning of section 2319 of the Revised Statutes of the United States," and that the failure of plaintiff to comply with the mining laws and regulations applicable to "lands belonging to the United States" worked a forfeiture of plaintiff's possessory rights.

Plaintiff submits that this court was not authorized to enter final judgment in favor of defendants, because the question of law so decided was not raised, presented or decided upon the trial in the court below, under the stipulation of the parties signed, filed and made part of the record in said cause; the court failed to take into consideration the controlling requirement of our statute.

Sec. 3141, C. L. of 1897.

II.

The court in overruling or disregarding the various orders and decisions of the Interior Department referred to, and particularly the order of the Commissioner of the General Land Office, made May 27, 1897, in reference to the reservation of this Cañada de Cochiti grant, within the claimed boundaries of which the *locus in quo* is admit-

tedly situated, failed to take into consideration that the Commissioner in directing the reservation of said grant, was acting within the scope of his legal executive power, and that his action, prior to final completion of the duties imposed by law upon the Interior Department, being executive and not judicial in character, was not assailable in the courts.

Sec. 2478, Rev. Stat. of U. S.
Sec. 9, p. 520, Supp. Stat. of U. S.
Art. 8, treaty with Mexico, C. L. of 1897, p. 31.

464 Kendall *vs.* San Juan Silver M. Co., 144 U. S., 664.

III.

This court in entering a final judgment for defendants, failed to take into consideration that upon a new trial the plaintiff would have the opportunity and occasion to introduce evidence showing that the entry made by defendants upon plaintiff's possession under color of the mining laws, was in fact initiated by fraud, and maintained by force, which was denied him upon the trial below as is shown by the record.

IV.

The plaintiff in error neglected to call the attention of the court to controlling authority upon the questions of law involved; and the court failed to consider the same, in connection with the facts shown by the record.

WARREN & FERGUSSON,
Attorneys for Plaintiff in Error.

I hereby certify that the foregoing petition for rehearing of said cause is, in my opinion, well founded and sufficient in law and true in fact.

H. L. WARREN,
Of Counsel for Plaintiff in Error.

465 And afterwards, to wit, at said regular term of the said supreme court, on the thirty-first day thereof, the same being Thursday, the first day of September, the following, among other, proceedings were had as follows, to wit:

HENRY LOCKHART, Plaintiff in Error, *vs.* THE WASHINGTON GOLD & SILVER Mining Company *et al.*, Defendants in Error.	No. 716. Error to District Court, Bernalillo County.

Now comes plaintiff in error, by E. A. Fiske, Esqr., of counsel, and moves the court for leave to file oral argument on printed brief on motion for rehearing, and the court, not being sufficiently advised in the premises, takes the same under advisement.

And afterwards, to wit, at said regular term of the said supreme court, on the thirty-second day thereof, the same being Friday, the

2nd day of September, A. D. 1898, the following, among other, proceedings were had as follows, to wit:

HENRY LOCKHART, Plaintiff in Error, *vs.* THE WASHINGTON GOLD & SILVER MINING Company *et al.*, Defendants in Error.	No. 716. Error to District Court, Bernalillo County.

This cause having come before the court upon a motion of plaintiff in error for a rehearing, and the court having had the said motion under consideration, and now being sufficiently advised in the premises, denies said motion. It is therefore considered by the court that the said motion for a rehearing in the above-entitled cause be, and the same hereby is, denied.

466 And afterwards, to wit, on the 17th day of December, A. D. 1898, there was filed in the office of the clerk of the supreme court an affidavit of value; which said affidavit of value is in words and figures as follows, to wit:

In the Supreme Court of the Territory of New Mexico, July Term, 1898.

HENRY LOCKHART, Plaintiff in Error, *vs.* THE WASHINGTON GOLD & SILVER MINING COMPANY *et al.*, Defendants in Error.	No. 716.

Henry Lockhart, of lawful age, being duly sworn, on his oath says that he is the plaintiff in the above-entitled cause, and that the matter in dispute in said cause, exclusive of all costs, exceeds the sum of five thousand dollars.

HENRY LOCKHART.

Subscribed and sworn to before me this 15th day of December, 1898.

ARTHUS L. FINCH,
Notary Public.

[SEAL.]

467 And afterwards, on, to wit, the 17th day of December, A. D. 1898, there was filed in the office of the clerk of the supreme court a motion of plaintiff in error for certified statement of facts and for order fixing amount of bond for costs; which said motion is in words and figures as follows, to wit:

In the Supreme Court of the Territory of New Mexico, July Term, A. D. 1898.

HENRY LOCKHART, Plaintiff in Error,
vs.
THE WASHINGTON GOLD & SILVER MINING Company *et al.*, Defendants in Error.
No. 716. Error to District Court, Bernalillo County.

Henry Lockhart, plaintiff in error in the said cause, having sued out a writ of error to bring into the Supreme Court of the United States for review the record and proceedings in the above-entitled cause, prays the supreme court of the Territory of New Mexico to fix the amount of the bond for costs to be executed by the plaintiff in error and to make and certify a finding and statement of the facts in the case and to transmit the same to the Supreme Court of the United States, together with the transcript of the proceedings and judgment or decree in said cause, in pursuance of law and of the rules of said court.

H. L. WARREN,
Attorney for Plaintiff in Error.

And afterwards, to wit, at the said regular term of the said supreme court, on the thirty-fourth day thereof, the same being Saturday, the 19th day of December, A. D. 1898, the following, among other, proceedings were had as follows, to wit:

HENRY LOCKHART, Plaintiff in Error,
vs.
THE WASHINGTON GOLD & SILVER MINING Company *et al.*, Defendants in Error.
No. 716. Error to District Court, Bernalillo County.

468 Now, upon the reading and filing of the motion of Henry Lockhart, plaintiff in error in the above-entitled cause, praying for a certified copy of the statement of facts and for an order fixing the amount of bond for costs in an appeal in the said cause to the Supreme Court of the United States from the judgment and decree of this court, it is ordered that the said motion be, and the same hereby is, granted as therein prayed for upon the giving of a good and sufficient bond in the sum of $250, to be approved by the chief justice of this court or one of the judges of the Supreme Court of the United States, for the payment of costs.

And afterwards, to wit, on the 28th day of February, A. D. 1899, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a certified copy of the statement of facts: which said statement of facts is in words and figures as follows, to wit:

In the Supreme Court of the Territory of New Mexico, July Term, A. D. 1898.

HENRY LOCKHART, Plaintiff in Error,
vs.
THE WASHINGTON GOLD & SILVER MINING Company *et al.*, Defendants in Error.

No. 716. Error to District Court, Bernalillo County.

Henry Lockhart, the plaintiff in error in the above-entitled cause, having prayed and appeal from the judgment and decision of this court heretofore and during the July, A. D. 1898, term thereof rendered and made in this cause, and said appeal having been allowed, and said plaintiff having also prayed that this court make and certify, in accordance with law and the rules of the Supreme Court of the United States, a finding and statement of facts in this cause to be transmitted and used on such appeal, this court does hereby make and certify the following statement of facts in the
469 nature of a special verdict herein, at the request of said plaintiff in error, as follows:

1. At the trial of this cause in the district court the parties stipulated and agreed with each other as follows: "It is stipulated and agreed by and between the plaintiff and defendants in the above-entitled cause that the premises in controversy in this case are situated within the limits of private land claim reported as No. 135 in the office of the surveyor general of the Territory of New Mexico, known as the Cañada de Cochiti tract, as said claim was surveyed by the surveyor general, said survey having been made and approved by Clarence Pullen, surveyor general, on the date of June 29th, A. D. 1885.

"It is further stipulated that said private land claim was never confirmed upon report of the surveyor general, but two petitions for the confirmation of the same *was* filed in the court of private land claims, one by Joel Parker Whitney, Jose Juan Lucero, Lauriano Lucero, Juan Cristoval Lucero, Jose de Jesus Lucero, Juan Teodora Lucero, Jose Telesforo Lucero, Bernard S. Rodey, and Hannah Harris, being numbered 205 on the docket of the court of private land claims, at Santa Fé, and filed March 2nd, 1893, and the other petition being filed by Manuel Urtado and Jose Antonio Gallego, on the 3rd day of March, 1893, and that said petitions were consolidated and said causes heard and decree of confirmation rendered by said court on the 29th day of September, A. D. 1894. * * *

"It is further stipulated and agreed that the said premises in controversy in this case are not included within the boundaries of said grant as confirmed in said decree."

"It is further stipulated and agreed that an appeal was taken from said decree by all of the said petitioners to the Supreme Court of the United States, in which court said cause is now pending upon said appeal and undetermined, said appeal being dated the 11th day of March, A. D. 1895."

Now, this court doth find the facts as stated in said stipulations to be true.

And now this court, at the request of the said defendants in error, makes the following findings of fact from the evidence in said
470 cause:

2. The plaintiff in error, Henry Lockhart, one Benjamin Johnson, and one Charles Pilkey, on the 10th day of July, A. D. 1893, attempted to locate the mining claim*ed* called the "Sampson," which includes the ground in controversy in this cause.

3. These locators did not know that the ground in question was included in any private claim until the winter or spring following this location, but believed it was on unoccupied public domain.

4. No location notice was filed for record for said Sampson location until December 9th, 1893, and it was then recorded by the plaintiff in error, Henry Lockhart.

5. The evidence fails to satisfactorily show that monuments were placed on the ground by plaintiff in error on the Sampson location within ninety days from the tenth day of July, 1893.

6. The evidence does not satisfactorily show that a discovery shaft upon said claim to the depth of ten feet from the lowest part of the rim of such shaft at the surface or that a tunnel, open cut, or adit was driven upon said claim, exposing mineral in place, within ninety days from July 10th, 1893.

7. On the 23rd day of October, 1893, the defendants in error went peaceably into possession of the ground in controversy and proceeded to make a location, known as the "Washington," and continued in the uninterrupted possession thereof until this suit was brought, and, so far as the evidence shows, are still in possession thereof.

Done at Las Cruces, New Mexico, February 9th, A. D. 1899.

FRANK W. PARKER,
Associate Justice of the Supreme Court of the Territory of New Mexico.

Plaintiff in error offers to note following exception, which is denied:

"To the finding and statement of which said facts, at the request of the defendants in error, the plaintiff in error at the time excepted and now excepts.

WILLIAM J. MILLS,
Chief Justice, etc.

Santa Fé, N. M., Feb. 28th, 1899."

471 And afterwards, to wit, on the 18th day of September, A. D. 1899, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a bond for costs; which said bond for costs is in words and figures as follows, to wit:

Supreme Court of the United States.

HENRY LOCKHART, Plaintiff in Error,
vs.
J. A. JOHNSON, JULIA JOHNSON, His Wife; CHARLES PILKEY, The Unknown Heirs of Lee Walker, Deceased; W. B. Childers, Edward W. Dobson, Charles Bonsall, and The Washington Gold & Silver Mining Co., Defendants in Error.

Know all men by these presents that we, Henry Lockhart, as principal, and Mrs. Ellen L. Lockhart and H. Brockmeier, as sureties, of the county of Bernalillo and Territory of New Mexico, are held and firmly bound unto J. A. Johnson, Julia Johnson, his wife; Charles Pilkey, The Unknown Heirs of Lee Walker, deceased; W. B. Childers, Edward W. Dobson, Charles Bonsall, and The Washington Gold and Silver Mining Company in the sum of five hundred ($500.00) dollars, lawful money of the United States, to be paid to them and their respective executors, administrators, and successors; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 6th day of September, A. D. 1899.

Whereas the above-named Henry Lockhart has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment in the above-entitled action by the supreme court of the Territory of New Mexico:

Now, therefore, the condition of this obligation is such that if the above named Henry Lockhart shall prosecute his said writ
472 of error to effect and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

(Signed) HENRY LOCKHART. [SEAL.]
MRS. ELLEN L. LOCKHART. [SEAL]
H. BROCKMIER. [SEAL.]

Witnesses:

——— ———.
——— ———.

TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

On this seventh day of September, A. D. 1899, before me came personally Henry Lockhart, Ellen L. Lockhart, and H. Brockmeier, who are respectively to me known to be the persons described in and who executed the foregoing instrument of writing as parties thereto, and respectively acknowledged, each for himself, that they executed the same as their free act and deed for the purpose therein set forth.

And the said Ellen H. Lockhart and H. Brockmeier, being respectively by me duly sworn, says, each for himself and not one for the other, that he is a resident and householder of said county of Ber-

nalillo, and that he is worth the sum of five hundred ($500.00) dollars over and above his just debts and legal liabilities and property exempt from execution.

HENRY LOCKHART.
MRS. ELLEN L. LOCKHART.
H. BROCKMEIER.

Subscribed and sworn to before me this 7th day of September, A. D. 1899.

JURTO L. ARMIJO,
[SEAL.] *Notary Public.*

The within bond is approved both as to sufficiency and form this 15th day of September, A. D. 1899.

WILLIAM J. MILLS,
Chief Justice, etc.

473 And afterwards, to wit, on the 23rd day of August, A. D. 1898, there was filed in the office of the clerk of the supreme court the opinion of the court in the above-entitled cause: which said opinion is in words and figures as follows, to wit:

In the Supreme Court of the Territory of New Mexico, July Term, A. D. 1898.

HENRY LOCKHART, Plaintiff in Error,
vs.
J. Q. WILLS ET AL., Defendants in Error. } No. 716.

Syllabus.

1. Lands embraced within the boundaries of a Mexican or Spanish grant in New Mexico in 1893, as claimed and which was *sub judice* in the court of private land claims, were open to exploration and purchase under the mining laws of the United States.
2. (*a.*) As against a subsequent locator, a location not perfected according to the territorial laws within the time provided becomes forfeited and void, and the ground embraced therein becomes open to location. (*b.*) Plaintiff, to maintain ejectment against a subsequent locator, must show a valid location. (*c.*) When the facts produced by plaintiff show forfeiture of his location has taken place, it is the duty of the court to instruct the jury to find for the defendants.
3. Where the facts show that a forfeiture of plaintiff's location has taken place for failure to perform the statutory requirements for a valid location, it is immaterial to show that such failure was a result of a conspiracy to defraud plaintiff on the part of plaintiff's co-locator with other persons to locate after forfeiture.
4. (*a.*) The assigning of a wrong reason for an act by the trial court is not reversible error if the act done was in law right. (*b.*) When the plaintiff's case is inherently and fatally de-

474 fective and is incurable, the defendant is entitled to have the judgment affirmed, notwithstanding errors of the trial court.

5. (*a.*) When plaintiff allows his location to become forfeited by failing to perfect same, as required by law, he cannot set up as an excuse for such failure that prior to the expiration of the time allowed by law to perfect his location other- took adverse possession of his claim, of which he was not aware until after forfeiture. (*b.*) In order for adverse possession and ouster to furnish an excuse for not perfecting the location of a mining claim, the party offering such excuse must have in some way been prevented thereby from perfecting his location. (*c.*) Lockhart *vs.* Wills *et al.*, 50 Pac., 318. Overruled.

Opinion of the Court.

PARKER, *J.:*

This is an action of ejectment brought by the plaintiff in error against the defendants in error in the district court of the 2nd judicial district, sitting in and for Bernalillo county, for the recovery of the possession of a piece or parcel of mining ground called by the plaintiff in error the Sampson mining claim, situated in the Cochiti mining district, in said county.

At the close of the trial the court instructed the jury to find a verdict in favor of the defendants and enter judgment accordingly. To review the action of the court below plaintiff prosecutes this writ of error.

It was stipulated by the parties that the premises in controversy are situated within the limits of the Cañada de Cochiti grant, as claimed and as surveyed and approved by the surveyor general of New Mexico on June 29th, 1885; that the grant was never confirmed by Congress on said report; that petitions were filed for confirmation of the grant in the court of private land claims by one set of claimants on March 2nd, 1893, and by another set of claimants
475 on March 3rd, 1893; that said *said* grant was confirmed by decree of said court September 29th, 1894; that the premises in controversy are not included within the boundaries of the grant as confirmed by said decree, and that appeal from said decree was taken to the Supreme Court of the United States and was pending and undetermined at the time of trial.

It is claimed by counsel for plaintiff that the premises in controversy being located within the boundaries of a claimed Mexican or Spanish grant, and which grant was at the time *sub judice* in the court of private land claims of the United States, the same was withdrawn or reserved from the public domain, and were not "lands belonging to the United States," open to exploration for mining purposes, within the meaning of section 2319 of the Revised Statutes of the United States. It is further claimed that as a consequence of the foregoing proposition the rights of the parties in this case are not to be determined by the ordinary rules governing the right of the possession of mining claims upon lands belonging

to the United States, as established by the Federal and territorial legislation; but they must be ascertained by the rules of law applicable to contests for the possession of land where neither party has title or right to title, and where each must depend upon the priority, extent, and continuity of actual possession. The first of the foregoing contentions is controverted by counsel for defendants, and it is insisted that the premises in controversy, although within the boundaries of the Cañada de Cochiti grant, as claimed, are "lands belonging to the United States" within the meaning of section 2319 of the Revised Statutes of the United States, and subject to appropriation under the mining laws. It is important, therefore, to ascertain the status of these lands at the time of the entry of the parties thereon.

The lands in controversy are within the territory ceded to the United States by Mexico by the treaty of Guadalupe Hidalgo in 1848. Article VIII of that treaty (9 Stat., 922) provides that Mexicans established in the ceded territory shall be free to remain or to remove at any time, retaining the property in the ceded territory or disposing of the same and removing the proceeds thereof, and, further, that property of every kind belonging to Mexicans not
476 established in the ceded territory shall be inviolably respected, the same as — the property belonged to the citizens of the United States. This section of this treaty came directly under the consideration of the Supreme Court of the United States in the case of Botiller *vs.* Dominquez, 130 U. S., 238. The case arose on the question as to whether a grant, perfect at the time of the treaty of Guadalupe Hidalgo, needed to be presented to the board of commissioners of California under the act of March 3, 1851, under a penalty of forfeiture. The court says: "By the treaty of peace known as that of Guadalupe Hidalgo, of February 2, 1848, 9 Stat., 922, which closed the controversy and the war between the United States and Mexico, a cession was made of a very large territory by the government of Mexico to the Government of the United States. This was a transfer of the political dominion and of the proprietary interests in this land; but the government of Mexico caused to be inserted in the instrument certain provisions intended for the protection of private property owned by Mexicans within this territory at the time the treaty was made, and it may be considered that the obligation of the United States to give such protection both by these treaty and by the law of nations was perfect. * * * Two propositions under this statute" (the act of March 3, 1851, requiring claimants of Mexican or Spanish grants in the State of California to present the same to the board of commissioners within a certain time, under penalty of forfeiture) "are presented by counsel in support of the decision of the supreme court of California. The first of these is that the statute itself is invalid, as being in conflict with the provisions of the treaty with Mexico, and violating the protection which was guaranteed by it to the property of Mexican citizens, owned by them at the date of the treaty; also in conflict with the rights of property under the Constitution and laws of the United States, so far as it may affect title perfected

under Mexico. * * * With regard to the first of this proposition, it may be said that so far as the act of Congress is in conflict with the treaty with Mexico, that it is a matter in which the court is bound to follow the statutory enactments of its own government.

If the treaty was violated by this general statute, enacted for
477 the purpose of ascertaining the validity of claims derived from the Mexican government, it was a matter of international concern, which the two States must determine by treaty or by such other means as enables one State to enforce upon another the obligations of a treaty. This court, in a class of cases like the present, has no power to set itself up as the instrumentality for enforcing the provisions of a treaty with a foreign nation which the Government of the United States, as a sovereign power, choses to disregard." We understand this case to mean that the treaty of Guadalupe Hidalgo established a duty upon the Government of the United States to protect Mexican citizens in all their rights of property which they possessed at the date of the treaty, but that we must look to the legislation of Congress alone to ascertain what has been done in this regard, and that the treaty itself placed no restriction whatever upon the disposition of any of these lands which the courts are bound to recognize. The same principle is recognized in Pinkerton *vs.* Le Doux, 129 U. S., 346, and Aztiazaran *vs.* Santa Rita Land and Mining Co., 148 U. S., 80. The lands included in the grant in question as claimed and as surveyed by the surveyor general of New Mexico were reserved from sale or other disposal by section 8 of the act creating the offices of surveyor general of New Mexico, Kansas, and Nebraska, passed July 22nd, 1854 (10 Stats., 308). The section provides that the surveyor general should ascertain the origin, nature, character, and extent of all claims of land under the laws, usages, and customs of Spain and make a report thereon, which was to be laid before Congress for such action thereon as might be deemed just and proper, with a view to conferm *bona fide* grants and give full effect to the treaty of 1848 (Guadalupe Hidalgo); and the section further provides, "And until the final action of Congress upon such claims all lands covered thereby shall be reserved from sale or other disposal by the Government." * * * Under this statute the surveyor general of New Mexico cause- the land in question to be surveyed, and on June 29th, 1885, approved the survey, but Congress never acted on the report nor confirmed the grant.

By the act of March 3, 1891 (First Supplement Rev. Stat. U. S.,
p. 917), Congress provided an entirely new method of ascer-
478 taining the rights of claimants to Spanish or Mexican land grants. It creates the court of private land claims, mentioned above in the stipulation of the parties, and confers upon it the jurisdiction to hear and determine the rights of claimants on petition in all cases where the claims have not been confirmed by Congress or otherwise fully decided upon by lawful authority. The act further provides that the decree of the court of private land claims shall be final as to the rights of claimants, unless appeal be taken to the Supreme Court of the United States; in which case the

decree of the latter court becomes a final adjudication of the rights of both claimant and the United States. It will therefore be seen that Congress elected to abandon its control over the adjudication and settlement of these land titles and to delegate the same to a new tribunal clothed with full and complete powers in the premises. No reservation of the land embraced within any claimed grant is contained in the act; but, on the other hand, section 15 of the act expressly repeals section 8 of the act of July 22nd, 1854, as follows: "That section eight of the act of Congress approved July 22nd, eighteen hundred and fifty-four, entitled 'An act to establish the offices of surveyor general of New Mexico, Kansas, and Nebraska, to grant donations to actual settlers therein, and for other purposes,' and all acts amendatory or in extention thereof or supplementary thereto, and all acts or parts of acts inconsistent with the provisions of this act *act* are hereby repealed." Section 14 of the act provides that in the proceedings before the court of private land claims, if it shall appear that the land or any part thereof decreed to any claimant under the provisions of the act shall have been sold or granted by the United States to any other person, such title from the United States shall remain valid, and such court shall render judgment in favor of such land claimant for the reasonable value of such land so sold or granted.

It will thus be seen from these acts of Congress that it has first established the reservation of the lands embraced within the boundaries of a claimed grant upon the report of the surveyor general, and that thereafter it has elected to repeal the reservation and the section of the act authorizing it and to provide for compensating any land claimant for any lands which the Government may have elected to sell and dispose of within the boundaries of his grant. It seems clear to us, therefore, that there is no statutory reservation of any of the lands embraced within the boundaries of a claimed grant in New Mexico.

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But it is urged by plaintiff that these lands have been held by the Land Department of the United States to be reserved, and that such construction is binding upon this court. We are referred to a decision of Secretary Francis, reported in 24 Decisions of Interior Department, p. 1, in which he holds that by the terms of treaties between the United States and Mexico lands embraced within Mexican or Spanish grants were placed in a state of reservation, and by the act of March 3, 1891, the reservation is continued in force. We are also referred to certain decisions of the Commissioner of the General Land Office, containing letter of instruction to the surveyor general of New Mexico. In each of these decisions the Secretary and the Commissioner have sought to determine as a matter of law the status of lands embraced within a claimed Mexican grant. While it is true that a finding of fact made by an officer of the Land Department of the Government in a matter with which that department is charged by law is binding upon the court, it has frequently been held that where the Land Department of the Government attempts to construe a law their construction is not binding upon the courts.

Wisconsin Central R. R. Co. *vs.* Forsythe, 159 U. S., 46.

It is further to be remarked that the right to the possession of a mining claim is never a matter for the determination of the Land Department of the Government. The location and possession of a mining claim is determined by the Federal and local legi*l*sation, and not until the locator seeks to obtain a patent for his mining claim does he come in contact with the Land Department. Aneven then, if his right to the possession of the claim be contested, the whole matter is referred by the Land Department to the court for determination. We do not agree to the construction put
480 upon the treaty of Guadalupe Hidalgo by the Land Department of the Government, nor do we think that construction is borne out by the Supreme Court of the United States in the case cited above. Neither any actual reservation of these lands by the Land Department nor any statutory authority for making such reservation has been called to our attention, and we assume that none exist.

There being no reservation of *this* lands within claimed grants in New Mexico by treaty, law, or authorized act of the executive department of the Government (Wolsey *vs.* Chapman, 101 U. S., 755), we conclude that they are not reserved lands and are "lands belonging to the United States" within the meaning of section 2319 of the Revised Statutes of the United States.

These conclusions are borne out by a case which arose under the legislation of Congress to settle the French and Spanish claims in the Territory of Louisiana. On February 15th, 1811, Congress passed an act authorizing the President to offer for sale all land which had been surveyed in the Territory, but made the following reservation: "Provided, however, that till after the decision of Congress thereon, no tract shall be offered for sale, the claim to which has been in due time and according to law," (under former acts of Congress for ascertaining and adjusting titles and claims to lands within the Territory of Orleans and the district of Louisiana and also Missouri) "presented to the recorder of land titles in the district of Louisiana and filed in his office, for the purpose of being investigated by the commissioners appointed for ascertaining the rights of persons claiming lands in the Territory of Louisiana." This reservation was continued in force up to May 26, 1829, when it ceased until it was revived by the act of July 9, 1832. A New Madrid location had been made by the defendant while this reservation was in force upon a tract claimed and filed under the act of 1811 and supplementary acts thereto. In passing upon the effect of the reservation and the attempted entry under the New Madrid certificate the court said: "His location was made on lands not liable to be thus appropriated, but expressly reserved, and this was the case when his patent was issued. Had the entry been made or the patent issued after the 26th of May, 1829, when the reser-
481 vation ceased and before it was revived by the act of 1832, the title of the defendant could not be contested."

Stoddard *et al. vs.* Chamber, 2 Howard, 285–318.

Numerous cases have arisen in California concerning the status

of lands embraced within claimed grants in that State, but it will be seen that they were all determined upon the acts of Congress peculiar to California and different from the present state of congressional legislation. By the act of March 3, 1851 (9 Stat., 631), Congress provided a commission to ascertain and settle the private land claims in the State of California. Sec. 13 of the act provides "that all lands the claims to which have been finally rejected by the commissioners in manner herein provided, or which shall be finally decided to be invalid by the district or supreme court, and all lands the claims to which shall not have been presented to said commissioners within two years after the date of this act, shall be deemed, held, and considered as part of the public domain of the United States." The act of July 1st, 1862 (12 Stat., 489), granted to certain railroad companies certain alternate sections of land on each side of their road, "not sold, reserved, or otherwise disposed — by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed." This grant was afterwards enlarged (13 Stat., 358), and continued the reservation from the grant by providing the grant "shall not defeat or impair any pre-emption, homestead, swamp-land, or other lawful claim, nor include any Government reservation or mineral land, or the improvements of any *bona fide* settler." The grant to the railroad company took effect January 31st, 1865, and the patent issued in 1870. Under the act of 1851 a claim for the Moquelamos Mexican or Spanish grant was duly filed with the commissioners and was finally rejected by the Supreme Court of the United States on February 13th, 1865. The land embraced therein thus became a part of the public land of the United States. The public-land system was extended to California by the act of March 3, 1853 (10 Stat., 246), and after the rejection of the Moquelamos grant entry was made of a portion of the land formerly
482 claimed thereunder, and patent issued subsequent to the patent of the railroad company. The grantee of the railroad company brought suit against the grantee of the last patentee to determine the ownership of the quarter section of land covered by both patents, and the Supreme Court of the United States, in Newhall *vs.* Sanger, 92 U. S., 761, held that by reason of the statutory reservations contained in the acts mentioned above the railroad company did not take the land in controversy under its patent of 1870, and that the entryman under the general laws, after the reservation of the act of 1851 ceased, took the land under his subsequent patent. Reference is made in the opinion to the fact that the Mexican grant was *sub judice* at the time the grant to the railroad company took effect, but we do not understand the court to put its decision on this ground, but upon the express statutory reservation. Numerous other cases arising in California have been decided by the same court upon the same principle or in which the same principle was recognized. (See Van Reynegan *vs.* Bolton, 95 U. S., 33; Hosmer *vs.* Wallace, 97 U. S., 575; Trenoth *vs.* San Francisco, 100 U. S., 251; Aurrecoechea *vs.* Bangs, 114 U. S., 381; Doolan *vs.* Carr, 125

U. S., 618; U. S. *vs.* McLaughlin, 127 U. S., 428; Car *vs.* Quigley 149 U. S., 652.)

Some of the principles envolved in the case under consideration have been discussed and a like conclusion reached by this court in Grant *v.* Jaramillo, 6 N. M., 313, and Chavez *vs.* Chavez de Sanchez, 7 N. M., 58.

(2.) Under the foregoing conclusion, this case must be determined upon the principle applicable to the ordinary contests for the possession of mining claim upon the public domain. The pertinent provisions of the laws of New Mexico in force at the time of the entry upon the lands in controversy by the parties are as follows: Section 2286 of the Compiled Laws of 1897 is as follows:

"SEC. 2286. Any person or persons desiring to locate a mining claim upon a veine or load of quarts or other rock in place, bearing gold, silver, sinnabar, lead, tin, copper or other valuable deposit, must distinctly mark the location on the ground, so that its
483 boundaries, may be readily traced, and post in some conspicuous place on such location a notice in writing, stating thereon the name or names of the locator or locator-, his or their intention to locate the mining claim, giving a description thereof, by reference to some natural object or permanent monument as will identify the claim; and also within three months after posting such notice, cause to be recorded a copy thereof in the office of the recorder of the county in which the notice is posted, and, provided, no other record of such notice shall be necessary."

Section- 1 and 2 of chapter 25 of the Laws of 1889 are as follows:

"SECTION 1. That the locator or locators of any mining claim, located after this act shall take effect, shall, within ninety days from the date of taking possession of the same, sink a discovery shaft upon such claim to a depth of at least ten feet from the lowest part of the rim of such shaft, at the surface, exposing mineral in place, or shall drive a tunnel, adit or open cut upon such claim, to at least ten feet below the surface exposing mineral in place."

"SEC. 2. The surface boundaries of all mining claims hereafter located, shall be marked by four substantial posts or four substantial monuments of stone set at each corner of such claim. Such posts or monuments of stone shall each be plainly marked so as to indicate the direction of such claims from each monument of stone or posts."

It will be seen that the laws require that the locator of a mine post his location notice, mark his surface boundaries with four substantial posts or monuments, properly marked, and within ninety days after taking possession sink a shaft upon such claim at least ten feet deep from the lowest part of the rim at the surface, exposing mineral in place, or drive a tunner, adit, or open cut at least ten feet below the surface, exposing mineral in place, and also within three months after posting such notice cause to be recorded a copy thereof in the office of the recorder of the county in which the notice is posted. The testimony offered in behalf of the plaintiff shows that he and his colocators posted a location

notice on the ground in controversy on July 10th, 1893, calling the Sampson mining claim, and that the same was not filed
484 for record until December 9th, 1893. The record discloses an entire absence of proof of the compliance with any of the other essential elements of a valid location save a discovery of mineral. Plaintiff introduced an amended location notice of the locators, under which defendants claimed, dated December 16th, 1893, which was duly recorded December 30th, 1893, and which resited that it is an amended location of the Washington mining claim, the original whereof was made October 23rd, 1893. No evidence was offered to show that the locators of the Washington mine exercised dominion over the premises as locators prior to October 23rd, 1893, and, in fact, proof was offered, but which was excluded on other grounds, which tended to show affirmatively that they did not appropriate the ground prior to that time. This suit was instituted on June 21st, 1895, and nothing was done or attempted to be done to perfect the Sampson location between July 10th, 1893, the date of location, and June 21st, 1895, the date of commencing action, except as above recited. There is no evidence in the record to show that the entry of defendants was otherwise than peaceable. Under this state of facts, and other facts to be hereafter discussed, the court directed a verdict for the defendant, and we think he committed no error. It is not to be questioned in this or any other court that a compliance with the Federal and territorial statutes is necessary to perfect and preserve once right to the possession of a mining claim. "The right to possession comes only from a valid location; consequently, if there is no location, there can be no possession under it. Location does not necessarily follow from possession, but possession from location. A location is not made from taking possession alone, but by working on the ground, recording, and doing whatever else is required for that purpose by the acts of Congress and local laws and regulations."

Belk *vs.* Meagher, 104 U. S., 284.

And a compliance with the local laws in regard to the acts required by them to be done to make a valid location was necessary on the part of the plaintiff and colocators under penalty of forfeiture. Faxon *vs.* Barnard, 4 Fed. Rep., 702; Mallet *vs.* The Uncle Sam Mining Co., 1 Nev., 188.

485 When the time expired within which those acts of location were to be performed under the statute the land embraced within plaintiff's location became open and subject to location and appropriation by any qualified person. Plaintiff's rights had become forfeited and extinguished at least as against a subsequent locator coming in before the defects in plaintiff's location had been cured. It was necessary for the plaintiff before he could maintain ejectment to show a valid location. Wills *v.* Blaine, 5 N. M., 238.

The facts showing that a forfeiture had taken place at the time of the location of the Washington mine, it was the duty of the court to take the case from the jury. Fairbanks *vs.* Woodhouse *et al.*, 6 Cal., 434.

(3.) The plaintiff offered evidence tending to show that the plaintiff and one Johnson entered into a contract with one Pilkey, such as is commonly called a grub-stake contract, and thereunder Pilkey located the premises as the Sampson mine in the names of the three parties; that before the expiration of the 90 days after location within which the same might be perfected Pilkey entered into a conspiracy with some of the defendants to locate the ground and to defraud plaintiff and Johnson of their rights; that in pursuance of such conspiracy the locators of the Washington mine visited the premises before the expiration of the ninety days, took samples therefrom for assay, and looked the ground over, and remained in the vicinity until the claim became forfeited and afterwards located it; that Pilkey had an equitable interest in the new location. Some of this evidence was admitted and some excluded, but we think it should all have been excluded as immaterial. When the Sampson location became forfeited the land claimed thereunder became public domain and open to location. . It was the same as if it had never been made as against the subsequent locator. No matter how firmly Pilkey was bound in law or in morals to perfect the location of the Sampson, the fact remains that he did not do so, and the claim consequently became forfeited—Saunders *et al. vs.* Mackey, 6 Pac. Rep., 361—and the fact of his conspiracy with others, if true, is en-
486 tirely immaterial. Doherty *vs.* Morris, 16 Pac. Rep., 911.

We do not wish to be understood as denying the proposition that if the relation of Pilkey to the plaintiff were such as to make him plaintiff's trustee in the Washington location he might be charged as such in a proper proceeding for that purpose as to any interest, if any, he might have therein. Saunders *et al. vs.* MacKey, 6 Pac. Rep., 361; Hunt *vs.* Patchin, 35 Fed. Rep., 816. But this is an action of ejectment bases upon the Sampson location, which had become forfeited.

(4.) It appears from the transcript that this case was tried in the court below upon the theory that the lands in controversy were not open to location as lands of the United States, being a part of the Cochiti grant as claimed. The court evidently was led into this error by the contention of counsel for plaintiff and by the implied or actual admission of counsel for defendants. The case was tried upon the question of prior possession in the plaintiff and whether he had lost his actual possession by abandonment at the time of the entry by the locators of the Washington. This led to the introduction of a vast amount of testimony concerning actual possession and acts and intentions of plaintiff as to abandonment of the claim, all of which we have seen was entirely immaterial under the views above expressed. At the close of the testimony the court took the case from the jury. It may be that as the case stood at the close of the trial, under the theory upon which it was tried, there were questions of fact which should have been submitted to the jury, but the plaintiff in his proof went into all the questions involving the validity or invalidity of his location of the Sampson mine. He showed every element of a mining location which he could show, and not only failed to show a valid location, but showed affirma-

tively that his location was forfeited and void at the time of the location of the Washington mine. It is therefore clear that to remand this case for a new trial would be but an empty ceremony. The result of a new trial could not but bring the same results. The assigning of a wrong reason for an act by the court below is not error if the act done was in law right. Weisner *v.* Browne,
487 122 U. S., 214. Where the plaintiff's case is inherently and fatally defective and is incurable the defendant is entitled to have the judgment affirmed, notwithstanding errors of the trial court. Barth *vs.* Clise, 12 Wall., 400; Evans *vs.* Pike, 118 U. S., 241. We decide, therefore, that the court in directing a verdict for the defendant committed no error.

(5.) This case was decided by this court at the last term and the cause remanded for a new trial. 50 Pac., 318. Motion for rehearing was made and allowed. Two points are made in the motion. The second is that the court in its former opinion failed to pass upon the proposition as to the statute of lands within claimed grants in New Mexico. As this underlies all the questions raised, we have been compelled to examine the whole case.

We cannot agree with the conclusion reached by this court on the former hearing of this case. It cannot be questioned that it was the duty of plaintiff to see that all the requirements as to location were complied with under penalty of forfeiture. He testifies that the first he learned of any adverse claim by defendants was after the expiration of the ninety days, and that he never visited the claim until long afterwards. Plaintiff failed to show or offered to show that he was prevented in any way from perfecting his location by reason of any unlawful entry and ouster by defendants prior to the expiration of the ninety days, and he showed the location under which defendants justified to have been made after the ninety days had expired. Upon this state of facts this court upon the former hearing held that it was material for the plaintiff to be permitted to show any act of dominion or adverse possession by defendants prior to the expiration of the ninety days as an excuse for his failure to perfect his location; but we cannot agree to this conclusion. These acts of defendants, if any were done, must have in some way prevented the plaintiff from perfecting his location. It cannot be said that a locator may calmly wait until his location becomes forfeited and then offer as an excuse the fact that he afterwards learned that others were holding adversely to him during the time he might have perfected his claim. If he was pre-
488 vented from perfecting his claim by a wrongful intrussion and by threaths of violence, if he should attempt to resume possession, this would furnish a complete excuse. Erhardt *vs.* Boaro, 113 U. S., 527, 534. But no such proof was offered. If this were an action of trespass for damages to the premises while plaintiff had the right to them, such proof might be material, but we cannot see how it can be, in view of the facts in this case. Another portion of the opinion deals with the question of abandonment and the proof competent thereunder, but in our view of the case this dis-

cussion is not pertinent. We cannot follow the conclusions reached at the former hearing by this court, and the same is overruled.

This disposes of all the assignments of error. We find no reversible error in the record, and the judgment of the lower court will be affirmed.

And it is so ordered.

FRANK W. PARKER,
Associate Justice.

We concur:

WILLIAM J. MILLS, *C. J.*
J. W. CRUMPACKER, *A. J.*
JOHN R. McFIE, *A. J.*

Leland, J., did not sit in this case.

489 TERRITORY OF NEW MEXICO, } ss:
County of Santa Fé, }

Supreme Court.

I, José D. Sena, clerk of the supreme court of Territory of New Mexico, do hereby certify that the foregoing 488 pages contain a true, full, and correct copy of the transcript and proceedings, pleadings, and opinion filed in the above-entitled cause, which is transmitted to the Supreme Court of the United States in accordance with a writ of error hereto attached.

Witness my hand and the seal of the supreme court of the Territory of New Mexico this 2nd day of October, A. D. 1899.

[Seal Supreme Court, Territory of New Mexico.]

JOSÉ D. SENA,
Clerk of the Supreme Court of the Territory of New Mexico.

Endorsed on cover; File No., 17,542. New Mexico Territory supreme court. Term No., 147. Henry Lockhart, plaintiff in error, *vs.* J. A. Johnson, Julia A. Johnson, his wife; Charles Pilkey, *et al.* Filed October 20, 1899.

No. 147.

Brief of McGowan for Pltf. in Error.

FILED
DEC 20 1900

Supreme Court of the United States.

October Term, 1900.

Filed Dec. 20, 1900.

HENRY LOCKHART,
Plaintiff in Error,

v.

J. A. JOHNSON, JULIA A. JOHNSON, CHARLES PILKEY, et als.,
Defendants in Error.

No. 147.

Statement and Brief for Plaintiff in Error.

J. R. McGOWAN,
Attorney for Plaintiff in Error.

WASHINGTON, D. C.
Gibson Bros., Printers and Bookbinders.
1900.

Supreme Court of the United States.

OCTOBER TERM, 1900.

HENRY LOCKHART,
PLAINTIFF IN ERROR,

v.

J. A. JOHNSON, JULIA A. JOHNSON, CHARLES PILKEY, ET ALS.,
DEFENDANTS IN ERROR.

No. 147.

STATEMENT AND BRIEF FOR PLAINTIFF IN ERROR.

This is a case in ejectment to secure possession of a tract of land first known as the "Sampson" lode or mining claim, afterwards as the "Washington" claim. The premises are situated in Bernalilo county, New Mexico. The suit was commenced in the district court for that county, was tried before a jury which, at the close of the hearing, was ordered to return a verdict for the defendants. It was then taken to the Supreme Court of the Territory on writ of error, which court unanimously reversed the judgment below and remanded the case for a new trial. *Record*, 266. This judgment of the Territorial Supreme Court was rendered October 2, 1897. The defendants in error entered a motion for rehearing which was not considered until a change of Federal administration had resulted in a complete change in the personnel of the court, when the motion for rehearing was allowed

and the case again heard, the former decision reversed, and the decision of the trial court affirmed. From this latter decision the case is brought here on error.

The record discloses the following facts necessary to a proper understanding of the case: "The plaintiff, with one Ben Johnson and Charles Pilkey, one of the defendants, on the 7th of May, 1893, entered into a contract in writing, under seal, whereby Pilkey agreed to 'prospect and *locate* such veins or lodes and placers as he may discover or know the existence of, containing valuable ores or minerals, in the name and for the joint benefit of all the parties' thereto, in the proportion of one-third interest to said Pilkey, and an undivided two-thirds interest to plaintiff and Johnson. The plaintiff and Johnson were to furnish Pilkey with certain articles and tools—set out in the contract—and agreed that when he had sunken a shaft or tunnel of a certain size in a vein of mineral-bearing quartz, to a depth of twenty feet, such vein to be designated by plaintiff and Johnson, they would pay him thirty dollars in money in addition to the articles and tools mentioned. The agreement was to continue in force for one year, and all discoveries or locations made by Pilkey during that time were to be covered by its terms. Pilkey was directly bound not 'to create any debt or make any contract binding the second parties to this agreement unless authorized to do so in writing by the said second parties.' It was also provided that 'any concealment of a discovery or failure to locate a valuable mineral claim or claims for the purpose of evading the terms of this agreement and defrauding the said second parties shall work a forfeiture of any right or interest, direct or indirect, that such first party might have or afterwards obtain, to and for the benefit of the said second parties." *Record*, 13.

During the life of this contract, and in pursuance of its terms and obligations, Pilkey discovered and took possession of the premises in dispute, being a tract of land 600 feet wide

and 1,500 feet long, afterwards named by the parties to the contract, the "Sampson Mine," and which later came to be known as the "Washington Mine." The location was made by Pilkey and possession taken by him on the 10th of July, 1893, for the joint benefit of the three parties to the agreement. *Record*, 21. This was about two months after the date of the contract. *Record*, 280; *2d Finding*. The location was made and the possession indicated by posting a notice in a conspicuous place upon said claim, containing a description of the grounds, and signed by the names of the three parties to the agreement. This fact is established by the testimony offered by both parties to the suit, as set out in the testimony and found in the first opinion of the Supreme Court. *Record*, 268. The evidence in the record also discloses that plaintiff and Johnson complied with their part of the contract.

Further facts, deemed important, are set out in a stipulation between the parties to the suit, found on pages 31 and 32 of the record, and made the first finding of the court. *Record* 279. This stipulation is as follows:

STIPULATION.

"It is stipulated and agreed by and between the plaintiff and defendants in above-entitled cause that the premises in controversy in this case are situated within the limits of private land claim reported as number 135 in the office of the surveyor-general of the Territory of New Mexico, known as the Canada de Cochita tract, as said claim was surveyed by the surveyor-general, said survey having been made and approved by Clarence Pullen, Surveyor-General, on the date of June 29, A. D. 1885.

It is further stipulated that said private land claim was never confirmed upon report of the surveyor-general, but two petitions for the confirmation of the same were filed in the court of private land claims, one by Joel

Parker Whitney, Jose Juan Lucero, Lauriano Lucero, Juan Cristoval Lucero, Jose de Jesus Lucero, Juan Teodora Lucero, Jose Telesfor Lucero, Bernard S. Rodney, and Hannah Harris, being numbered 205 on the docket of the court of private land claims at Santa Fé, and filed March 2, 1893; and the other petition being filed by Manuel Hurtado and Jose Antonio Gallego on the 3d day of March, 1893, and that said petitions were consolidated in said cases heard and decree of confirmation rendered by said court on the 29th day of September, A. D. 1894, a compared copy of which decree is attached to this stipulation.

It is further stipulated and agreed that the said premises in controversy in this case are not included within the boundaries of said grant as confirmed by said decree.

It is further stipulated and agreed that an appeal was taken from said decree by all of the said petitioners to the Supreme Court of the United States, in which court said cause is now pending upon said appeal and undetermined, said appeal being dated the 11th day of March, A. D. 1895.

It is further stipulated and agreed that the official printed copies of the reports of the surveyor-general to Congress upon said private land claim, and all documents attached thereto, may be used upon the trial of this cause to the same effect as if they were the original documents and archives on file in the surveyor-general's office, subject, however, to such objection as the parties may make upon other grounds."

WARREN, FERGUSSON & GILLETT,
Plaintiff's Attorneys.

CHILDERS & DOBSON,
W. C. HEACOCK,
For Defendants.

Before the commencement of the suit, the property had passed by judicial decree into the hands of Charles Bonsall as receiver, who was made one of the defendants by leave of the court.

An ordinary declaration in ejectment was filed and the defendants plead not guilty, and demanded a jury trial.

Upon the trial of the case, as appears by the record, the plaintiff made frequent offers to prove the alleged conspiracy between Pilkey, Walker, and Fagaly to defraud him out of his possession. The statements of these defendants, against interest, made to various parties, were offered in proof, also their acts in carrying out the conspiracy. Several witnesses were sworn and examined before the court, in the absence of the jury, whose testimony disclosed substantially the following: That about the time Pilkey entered into the contract with the plaintiff and Johnson, and before he started to make the explorations required of him by such contract, he arranged with Levy Walker (also known as Lee Walker) and Frank Fagaly, two notorious gamblers, whereby he was to notify them when he found valuable ore, and between them they were to cheat and defraud Lockhart and Johnson out of the benefits of the contract; that in pursuance of this arrangement, when Pilkey found valuable ore on the premises, known at that time as the "Sampson," he communicated the fact to Fagaly, who had some of the ore assayed, the assay indicating that it ran in gold and silver as high as $2,600 to the ton; and thereupon Fagaly went to the premises, a place difficult of access, located some 75 miles from Albuquerque, where all the parties lived, and he and Pilkey carried out the conspiracy so far as they could by Pilkey omitting to do any further work on the claim by setting up other boundaries, sinking shaft to proper depth, &c., as bound to do under his contract with Lockhart and Johnson, and as definitely directed to do by Lockhart, and by occupying the premises to the exclusion of the right of occupancy of Lockhart and Johnson, subsequently removing and destroying the notice that had been placed on the premises in the name of Lockhart, Johnson, and Pilkey, by which said notice the premises were named the "Sampson," and substituting a notice signed by F. Fagaly, Lee (Levy) Walker, H. C. Leeds, and J. Johnson, wherein the premises were

named the "Washington." It being in evidence that plaintiff and Ben Johnson and Pilkey took possession of the premises and placed their said notice thereon on the 10th day of July, 1893, it was further disclosed by the offered testimony—and other proofs tendered—that Fagaly and Pilkey entered upon the same on behalf of themselves and their co-conspirator, or co-conspirators, as early as the following September, and continued to occupy thereafter to the exclusion of the plaintiff and said Ben Johnson, and that for the purposes of covering up the fraud, the name of Pilkey was omitted from the notice subsequently placed on the premises by the defendants, and omitted from any other papers relating to the claim—but that two shares were put into the name of Lee Walker, one of which he was to hold in trust for Pilkey. On this point, and relating to statements and confessions made by Fagaly, one witness—H. B. Fergusson—testified before the court, in the absence of the jury, as follows:

> "Q. Now you will please state what, if anything, he said as to a prearrangement between himself, Walker, and Pilkey, with reference to the possession of the ground in controversy in this suit, originally called the Sampson, and subsequently, by these defendants, called the Washington.
>
> A. When I first asked him to tell me all the facts in the matter, as above stated, he said, 'I do not like to do it, if I were a mind to,' and I am giving his exact words now—'I do not like to do that' as near as I can recollect—'If I were a mind to I could knock them out of the Washington claim entirely.'
>
> Counsel for defendant: That is, Fagaly said that?
>
> A. Yes, sir. He had previously expressed his hostility to Wills, Johnson, and Leeds, saying, in effect, he had taken all of them into the Washington; that they were now trying to rob him of a part of his interest. After saying: 'If I were a mind to I could knock them out of the Washington claim entirely,' or words to that effect—that is as near as I can recall the exact words—

he added, 'I don't like to tell this thing, because, if I am a gambler'—he used exactly these words—'I have a good reputation in this town.' I then told him I thought it was his duty to tell me after saying that much to me, but he went away that day, saying he wanted to think about it more. Subsequently he came up and told me he was ready to tell me all he knew about it, and would take the stand and testify, and, in direct answer to the last question, he said that Walker came to him, certainly not earlier than September. He first said in the latter part of the summer of 1893. When I pressed him to fix the month, he said it might have been in August, but certainly was in September that Walker came to him in Albuquerque, Levy Walker, or Lee Walker, as he is indiscriminately called, and told him that Pilkey had something good in the Cochiti mountains; that Pilkey and he had long been friends—that is, that Walker said to Fagaly, as Fagaly reported it to me—that he, Walker, and Pilkey had long been friends, and Pilkey, in prospecting for Lockhart and Ben. Johnson, had found some valuable claims, and that Pilkey was willing to fix one of them, which he thought was the best, so that they could get it, or words to that effect; that he, Pilkey, wanted him, Walker, to go up with him and see what he had; that Walker said to him, Fagaly, after stating this, that he was not in good health and could not stand the fatigue or hardship, and that he believed Pilkey would be willing to take Fagaly in with him, provided he, Fagaly, would go and see about it, see what he had, whether it was worth fooling with, with a view of acquiring it. Fagaly said he then went up in the same month of September, early in September, inspected the claims, and, especially what was known as the Sampson, being the one that Walker had referred to, as I understood, as being what Pilkey considered the best. I would like to state that these disclosures were in response to questions from me, myself; that he found the claim with a notice posted on it and some work done; that he examined the lead and took a piece of rock selected by himself and Pilkey; brought it back to Albuquerque with him; had it assayed

and got an assay of a little more—I do not remember the exact dollars, but I do remember it was a little in excess, as he reported to me, of $2,600 a ton. He said he immediately stirred around lively after getting that assay and took in—I do not remember whether he said he took them in then or not; that after getting the assay he made arrangements to go up and locate the claim. He told me that he made two trips to this mining claim, the Sampson, before the date that it would expire, which was the 10th of October, 1893. The first one was a brief visit to get this ore; the next one he went up with Pilkey about the first of October, or soon after the first of October, and went on the claim again with Pilkey and remained in Pilkey's camp until the 10th of October had expired, and that from the 10th of October until the 23d of October Pilkey was paid $2.00 a day by the partnership or parties who were to locate this ground to take care of the claim for them.

Q. From what time?

A. From the 10th.

Court: To the 23d?

A. Yes, sir; until the Washington was located; that he, Fagaly, spent part of that time in the village of Cochiti waiting for the time to expire, and he told me it was not located as soon as the day of October 10th passed because it would excite suspicion if it was located too soon afterwards; that the arrangement was made with Pilkey before the 10th of October, 1893, by which the claim was to be located in the name of four people, and that the ownership was to be one-fifth to H. C. Leeds, as he stated, one-fifth to J. Johnson, one-fifth to himself, Fagaly, the other two-fifths were to stand in Levy Walker's name, but one-fifth was to belong to Pilkey; that Pilkey agreed, in consideration of having one-fifth of not being called upon for development expenses for his share, and of this pay as laborer on claim at $2.00 a day, to allow the time within which the work on the Sampson claim was to be done, within which it was to be staked, and the notice to be recorded, to expire without doing it. This he told me in substance and effect in various conversations."

See Record, pp. 111 and 112.

There was other testimony to the same effect given before the court in the absence of the jury, part of it disclosing the agreement between Pilkey, Fagaly and Walker—which was made before Pilkey started out to fulfill his contract with the plaintiff and Ben. Johnson. For instance, Mrs. Stella A. Metz, a woman who kept a boarding-house in Albuquerque where Lee Walker boarded, testified on pages 135 and 136 of the record:

"Q. Please state what was said by Pilkey, Walker and Fagaly to you prior to the first of October, 1893, in reference to the possession of the property known as the Sampson mine?

A. Well, my statements would go back to April of 1893 before the locations were ever made in regard to this matter, what I knew of it.

Q. By anybody?

A. By Levy Walker and Charles Pilkey.

Q. Statements made between June 10, 1893, and the 1st of October, 1893; just state what was said by them in reference to the possession, if anything, of this property.

A. Well, I don't see how I could state it unless I begin at the beginning before the locations were made.

Q. Well, it is not necessary to go back beyond the time I have indicated.

A. Well, Mr. Pilkey and Mr. Walker entered into an agreement; he was going prospecting for Mr. Lockhart and Mr. Johnson, and that he was to retain—if he would provide for a woman in old town, he would retain and protect the best location made for them; when the time expired he could either relocate it or have someone else relocate it, and give him a silent interest in it, him, Pilkey, a silent interest in it, the best location, that he reserved for them, Pilkey and Walker.

Q. Where were these conversations?

A. In my house and at my table at different times.

Q. When did you first hear of the Sampson mine from them?

A. The latter part of June or the first part of July; I am not positive which.

Q. 1893?

A. Yes, sir.

Q. State what was said in reference to the possession of that mine at that time?

A. Well—whom it was in possession of?

Q. Yes.

A. The supposition was it belonged——

Q. Just state what they said.

A. That he had made these locations for Henry Lockhart and Ben. Johnson and himself.

Q. What locations?

A. The Sampson and the Columbus are the only two names I remember; there were other locations made I think but I do not remember the names.

Q. Who took part in these conversations when the Sampson was first alluded to?

A. No one but Mr. Walker and Mr. Pilkey.

Q. What if anything did Pilkey state with reference to having made the Sampson location for Johnson and Lockhart?

A. He made this location as he said he thought it was the best one and he would let the time run out, and as I told you he said they would relocate it; he would let the time run out; Walker could relocate it or send some one to relocate it and give him a silent interest in this mine now known as the Washington.

Q. Was Fagaly present?

A. Not at that time.

Q. At any time were they three present before the 1st of October, 1893?

A. Yes, sir; in September.

Q. What time in September, about?

A. Between the 5th and 10th, but the day I do not remember.

Q. What, if anything, was said by Pilkey or either of the other two in reference to who then had possession of the Sampson mine?

A. Pilkey was guarding it for Mr. Walker, but the time hadn't—it was then too early to relocate it."

See Record 135 and 136.

All this testimony and testimony of this character the court refused to allow to go to the jury.

Eventually the counsel for the plaintiff made the following offer in writing, to which objection was made and objection sustained, and exception entered: *Record*, 248–9.

> "The following statement in writing is submitted to the court and made a part of this record, in connection with the witness Neeland's testimony while on the stand by counsel for plaintiff, which testimony proposed to be offered is objected to by counsel for defendants, which objection is sustained by the court, and to which ruling of the court counsel for plaintiff excepts.
>
> In connection with the witness, John S. Neeland, now on the stand, we reoffer his testimony as taken before the court upon the case in chief of the plaintiff, and then ruled out; that evidence as taken by the stenographer is offered now in rebuttal; and we also offer the testimony of Mrs. Stella A. Metz, George Blake, B. J. Lohman, and Mrs. Ellen L. Lockhart, offering to prove by the said witnesses statements made at different times and places to the said witnesses by Frank Fagaly, Levy Walker, who are now dead, as well as statements of Charles Pilkey, who is now a defendant in this case, which statements of the said three parties, two of whom are now dead, were made prior to October 10, 1893; and the said statements were and are to the following effect:
>
> That in September, 1893, ore was sent from the Sampson mine by Pilkey, who was then in charge of the Sampson mine for Henry Lockhart and Ben. Johnson, to Levy Walker, which the said Walker had assayed; that thereupon soon afterwards the said Pilkey being in Albuquerque, and about the middle of September the said Walker and Pilkey agreed to take Frank Fagaly into the scheme to obtain possession of the said Sampson mine and oust the said Henry Lockhart and Ben. Johnson therefrom; that it was then arranged by the three parties named, in the presence of some one or more of the above-named witnesses, that the said Fagaly should accompany the said Pilkey to the Sampson mine for the first time in the

month of September, 1893, and did go into possession with the said Pilkey of the said mine in pursuance of the arrangement and conspiracy aforesaid, did exercise acts of ownership and possession and take samples of ore from said vein, with which he returned to Albuquerque; that thereupon assays were had of the said ore so brought by said Fagaly to Walker, and that soon after the return of said assay, which was about $2,600 to the ton, the said Pilkey came to Albuquerque October 2 or 3, 1893, and that it was then arranged, that in view of the large assay it was necessary to speedily get back upon the said Sampson claim, inasmuch as ninety days would elapse from its location on October 10th, and that on or about the 6th or 7th of October the said Fagaly and the said Pilkey actually left Albuquerque with the expressed intention of taking actual possession of the said Sampson mine, and did so actually, prior to October 10, 1893, resume the possession and so take the possession which had been begun when Fagaly first visited said mine in September, and from that taking of actual foot possession prior to October 10, 1893, they actually so held possession and have continually held it since."

In the Supreme Court of the Territory the plaintiff assigned the following errors: *Record*, 263–4.

ASSIGNMENT OF ERRORS.

Now comes Henry Lockhart, the plaintiff in error in the above entitled cause, and assigns the following errors appearing in the record herein, viz:

1. The court erred in admitting improper and incompetent evidence against the objection of plaintiff below.
2. The court erred in excluding material, competent, and proper evidence offered by the plaintiff below.
3. The court erred in instructing the jury to find a verdict for the defendants below.
4. The court erred in refusing to submit the issues of fact in said cause to the jury.

5. The court erred in determining the issue of alleged abandonment of the premises by plaintiff below as a question of law when the same was a question of fact, and in determining the same against the plaintiff below upon the evidence, and in refusing to submit the same to the jury.

6. The court erred in denying the motion of plaintiff below for a new trial of said cause.

7. The plaintiff below was denied a fair and impartial trial. Wherefore, and for divers other errors appearing in said record, the plaintiff in error prays that the judgment below in said cause be in all things reversed and set aside, and that such further proceedings be had therein as may be agreeable to law.

After the final judgment in the Supreme Court of the Territory the plaintiff filed the following motion for a rehearing which motion was disallowed: *Record*, 275–6.

MOTION OF PLAINTIFF IN ERROR FOR REHEARING.

The plaintiff in error, by Warren and Fergusson, his attorneys, prays the court for a rehearing in the above-entitled cause, and respectfully shows into the court the following grounds for this petition, viz:

I.

This court decides, in the opinion filed herein, that, "there being no reservation of these lands within claimed grants in New Mexico, by treaty, law or authorized act of the executive department of the Government, we conclude that they are not reserved lands, and are 'lands belonging to the United States,' within the meaning of section 2319 of the Revised Statutes of the United States," and that the failure of the plaintiff to comply with the mining laws and regulations applicable to "lands belonging to the United States" worked a forfeiture of plaintiff's possessory rights.

Plaintiff submits that this court was not authorized to enter final judgment in favor of defendants, because the question of law so decided was not raised, presented or decided upon the trial in the court below, under the stipulation of the parties signed, filed and made part of the record in said cause; the court failed to take into consideration the controlling requirement of our statute.

Section 3141, C. L. N. M., of 1897.

II.

The court in overruling or disregarding the various orders and decisions of the Interior Department referred to, and particularly the order of the Commissioner of the General Land Office, made May 27, 1897, in reference to the reservation of this Canada de Cochiti grant, within the claimed boundaries of which the *locus in quo* is admittedly situated, failed to take into consideration that the Commissioner in directing the reservation of said grant, was acting within the scope of his legal executive powers, and that his action, prior to final completion of the duties imposed by law upon the Interior Department, being executive and not judicial in character, was not assailable in the courts.

Sec. 2478, Rev. Stat. of U. S.
Sec. 9, p. 520, Supp. Stat. of U. S.
Art. 8, Treaty with Mexico, C. L. of 1897, p. 31.
Kendall *v.* San Juan Silver M. Co., 144 U. S. 664.

III.

This court, in entering a final judgment for defendant, failed to take into consideration that upon a new trial the plaintiff would have the opportunity and occasion to introduce evidence showing that the entry made by defendant upon plaintiff's possession under color of the mining laws, was in fact initiated by fraud and maintained by force, which was denied him upon the trial below, as is shown by the record.

IV.

The plaintiff in error neglected to call the attention of the court to controlling authority upon the questions of law involved, and the court failed to consider the same, in connection with the facts shown by the record.

The following findings were also made and certified by the Supreme Court: *Record*, 279, 280.

IN THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.
JULY TERM, A. D. 1898.

HENRY LOCKHART, Plaintiff in Error, *v.* THE WASHINGTON GOLD & SILVER MINING COMPANY *et al.*, Defendants in Error.	No. 716. Error to District Court, Bernalilo County.

Henry Lockhart, the plaintiff in error in the above-entitled cause, having prayed an appeal from the judgment and decision of this court, heretofore and during the July, A. D. 1898, term thereof rendered and made in this cause, and said appeal having been allowed, and said plaintiff having also prayed that this court make and certify, in accordance with law and the rules of the Supreme Court of the United States, a finding and statement of facts in this cause to be transmitted and used on such appeal, this court does hereby make and certify the following statement of facts in the nature of a special verdict herein, at the request of said plaintiff in error as follows:

1. At the trial of this cause in the district court, the parties stipulated and agreed with each other as follows: "It is stipulated and agreed by and between the plaintiff and defendants in the above-entitled cause that the premises in controversy in this case are situated within the limits of private land claim reported as number 135 in the office of the surveyor general for the Territory of New

Mexico, known as the Canada de Cochiti tract, as said claim was surveyed by the surveyor general, said survey having been made and approved by Clarence Pullen, surveyor general, on the date of June 29, A. D. 1885.

"It is further stipulated that said private land claim was never confirmed upon report of the surveyor general, but two petitions for the confirmation of the same *was* filed in the court of private land claims, one by Joel Parker Whitney, Jose Juan Lucero, Lauriano Lucero, Juan Cristoval Lucero, Jose de Jesus Lucero, Juan Teodora Lucero, Jose Telesforo Lucero, Bernard S. Rodney, and Hannah Harris, being numbered 205 on the docket of the court of private land claims, at Santa Fé, and filed March 2, 1893, and the other petition being filed by Manuel Urtado and Jose Antonio Gallego, on the 3d day of March, 1893, and that said petitions were consolidated and said causes heard and decree of confirmation rendered by said court on the 29th day of September, A. D. 1894. * * *

"It is further stipulated and agreed that the said premises in controversy in this case are not included within the boundaries of said grant as confirmed in said decree."

"It is further stipulated and agreed that an appeal was taken from said decree by all of the said petitioners to the Supreme Court of the United States, in which court said cause is now pending upon said appeal and undetermined, said appeal being dated the 11th day of March, A. D. 1895."

Now, this court doth find the facts as stated in said stipulations to be true.

And now this court, at the request of the said defendants in error, makes the following findings of fact from the evidence in said cause:

2. The plaintiff in error, Henry Lockhart, one Benjamin Johnson, and one Charles Pilkey, on the 10th day of July, A. D. 1893, attempted to locate the mining claim*ed* called the "Sampson," which includes the ground in controversy in this cause.

3. These locators did not know that the ground in question was included in any private claim until the

winter or spring following this location, but believed it was on unoccupied public domain.

4. No location notice was filed for record for said Sampson location until December 9, 1893, and it was then recorded by the plaintiff in error, Henry Lockhart.

5. The evidence fails to satisfactorily show that monuments were placed on the ground by plaintiff in error on the Sampson location within ninety days from the 10th day of July, 1893.

6. The evidence does not satisfactorily show that a discovery shaft upon said claim, to the depth of ten feet, from the lowest part of the rim of such shaft at the surface, or that a tunnel, open cut, or adit was driven upon said claim, exposing mineral in place, within ninety days from July 10, 1893.

7. On the 23d day of October, 1893, the defendants in error went peaceably into possession of the ground in controversy and proceeded to make a location, known as the "Washington," and continued in the uninterrupted possession thereof until this suit was brought, and, so far as the evidence shows, are still in possession thereof.

Done at Las Cruces, New Mexico, February 9, A. D. 1899.

FRANK W. PARKER,
Associate Justice of the Supreme Court of the Territory of New Mexico.

Plaintiff in error offers to note following exception, which is denied:

"To the finding and statement of which said facts, at the request of the defendants in error, the plaintiff in error at the time excepted and now excepts."

WILLIAM J. MILLS,
Chief Justice, &c.

ARGUMENT.

The plaintiff's assignments of error on which the case was tried in the Supreme Court of the Territory (Rec. 263–4), his motion for rehearing and the points made thereunder (Rec. 275–6), and the findings of fact (Rec. 279–80), bring the case before this court under the laws and rules relating to appeals from supreme courts of Territories. San Pedro, &c., Co. *v.* U. S., 146 U. S. 120–36; 911, and Zeckendorf *v.* Johnson, 123 U. S. 617–31; 277. We also conceive that the court may properly pass upon the alleged errors in the admission and rejection of proffered evidence, as this does not require an examination of the *weight* of the evidence and does not involve any disregard of the facts as found. Young *v.* Amy, 171 U. S. 179–43; 127. The findings make no reference to the fact that plaintiff offered to prove that the defendants secured the possession from him by fraud, and that the trial court ruled out proofs tending to establish this fact. Neither do they show that the court took the case from the jury and thus determined itself the alleged fact of abandonment. Hence this court, under Young *v.* Amy *supra*, may pass upon these questions found in the record and raised by the assignment of errors.

Upon the trial of the case the plaintiff depended on the following contentions:

1. That the premises were located within the claimed boundaries of the Spanish grant known as the Canada de Cochiti, which was then in a state of reservation and the title to which was then in litigation, and that said grant was not such "public lands of the United States" as were subject to the mining laws of the United States or those of the Territory, and hence plaintiff was not required to put up monuments, sink shaft, &c., within three months—or any other time—in order to maintain his possession.

2. That while the plaintiff was properly and peaceably in possession he was wrongfully ousted by the defendants as the result of a conspiracy and fraud.

I.

Was the tract in question upon lands subject to mineral location?

The stipulation between the parties (Rec. 31), which forms the first finding of the court, discloses the following facts:

1. That the premises were within the claimed boundaries of a Spanish grant that had been duly surveyed by the surveyor general of the Territory and reported to Congress in pursuance of the requirements of the act of July 22, 1854 (10 St. 308); and, 2, that at the time the plaintiff went into possession and when this suit was begun the whole question of the title to said grant was *sub judice*. Upon these facts we contended and contend that the land was in a state of reservation and was not "lands belonging to the United States," within the meaning of section 2319 of the Revised Statutes of the United States, which determines the character of lands open to exploration for mining purposes.

The grant having been surveyed and reported to Congress under section 8 of the act of 1854 *supra*, all the lands within the boundaries were at once reserved by the terms of the act itself. The act provides that when the report is made according to prescribed form it "shall be laid before Congress for such action thereon as may be deemed just and proper, with a view to confirm *bona fide* grants, and give full effect to the treaty of 1848 between the United States and Mexico; and, until the final action of Congress on such claims, all lands covered thereby shall be reserved from sale or other disposal by the Government, and shall not be subject to the donations granted by the previous provisions of this act."

This settles conclusively the question of the reservation of the Canada de Cochiti grant at the times mentioned, unless such reservation had been subsequently legally cancelled. The court below, in arguing this question in its opinion (Rec.

283, *et seq.*), alleges, in substance, that section 15 of the act of March 3, 1891 (26 St. 854), by repealing section 8 of the act of 1854, terminated the reservation. But the repealing section does not, either by express words or necessary implication, undertake to terminate reservation of claimed grants then existing.

The act of 1891 simply established another scheme for settling the questions relating to titles of private land grants. The then existing scheme was found in section 8 of the act of 1854. It was therefore necessary to repeal that section. After 1891 no more such grants would be reported to Congress, and hence there would be no further legislative reservations of the character made therefrom. But this repeal did not destroy the reservations existing. It would have been unjust to have done so. It would have violated the national obligations found in the treaty of Guadalupe Hidalgo. By articles VIII and IX of said treaty the private property within the ceded territory belonging to resident or non-resident Mexicans was to be fully protected. And in a protocol to said treaty it is declared, in relation to private grants, made by Mexico in the ceded territories, that the true intent is to "preserve the legal value they may possess, and the grantees may cause their legitimate titles to be acknowledged before the American tribunals." Without any legislation on the part of Congress this would have been sufficient to have preserved the grants from any appropriation by others until the "American tribunals" had fixed the quality and extent of the titles by decree. Any proper tribunal would have so held. It was only to add to this assurance of reservation, and to give positive notice to the executive departments that the treaty provisions were to be respected both in letter and spirit, that any legislation on the subject was needed. And from this point of view it would not have changed the rights of the private grant claimants even if the legislative reservations had been cancelled. The treaty reservations would have stood and been

sufficient to have kept the grants severed from the "public domain" until the grantee's rights had been finally decreed.

The land department has always taken the view which we here urge. Subsequent to the act of 1891 Secretary Smith discussed and decided this very question, with others, in Tumacacori and Calabayas Grant, 16 L. D. 408. This decision was rendered in May, 1893, and I cannot do better than to bring to the attention of the court some portions of it bearing on this question of the reservation of the Spanish and Mexican grants within our territories. The Secretary says:

> "It has been shown that in pursuance of the national obligation to protect property rights, in the newly ceded territory, Congress passed the act of 1854 *supra*, as to the land within the then boundaries of New Mexico, which were enlarged, a few days thereafter, so as to include the Gadsden purchase. By section 8 of the recited act and regulations thereunder, parties claiming land grants within said territory were to make claim therefor before the surveyor general, and present to him their evidence on that behalf. That officer was to ascertain 'the origin, nature, character and extent of all claims' thus submitted, under the rules prescribed, and make full report on all such 'claims' to Congress for its action; and until the final action of that tribunal 'on such claims, all lands covered thereby shall be reserved,'" etc.
>
> This language, to my apprehension, is perfectly plain, its meaning clear beyond controversy, leaving no room for discussion which would fail to enlighten.
>
> The legislation of Congress in relation to grants in the territory acquired from New Mexico was somewhat different from its legislation as to grants within previously acquired territory. In regard to the Mexican grants, whilst intending to fully protect private property interests it was not proposed to recognize those grants as complete, but rather as inchoate, and needing further confirmatory action on the part of the Government. The purpose of this legislation was not to evade any national obligations or to meet them in a narrow or illiberal manner

and with a view of enforcing forfeiture, but to discharge them in a broad and liberal spirit as becomes a great nation desiring to afford protection to just rights, by giving the parties who possess them an opportunity to make a record thereof in this country in such a manner as will prevent future controversy, and put the land titles of those communities upon a stable foundation. Fremont *v.* United States, 17 How. 542, 553; Botiller *v.* Domingues, 130 U S. 238–247.

None of the titles being recognized, before adjudication, as complete, they were held to be mere "claims" for land asserted to have been granted while the country was under the dominion of a former government. To carry out, in good faith, our obligations, it was of the utmost importance that the land covered by such "claims" should be held intact for the benefit of the claimants, if successful in the assertion of right thereto. This could only be done effectually by severing those lands from the public domain and placing them in reservation. Of so much importance did Congress deem this reservation that it was not content to leave the matter to the discretion of those charged with the administration of the land laws, whose power, if exercised, was ample to make a reservation; but it unequivocally and in the most positive manner declared that all lands covered by such claims "shall be reserved." This mandate is peremptory, without qualification, and emanates from the highest authority known to the law. The act does not say that the Secretary may in his discretion reserve the claimed lands, or if the Commissioner be satisfied the claim is legal or *bona fide*, or that the proceedings before the surveyor general be regular, then the Commissioner may reserve them or not. * * *

By act of March 3, 1853 (10 Stat. 244), the public lands in California, with certain exceptions, were thrown open to settlement and entry. Among the exceptions were "lands claimed under any foreign grant or title." In the case of Newhall *v.* Sanger (92 U. S., 761), the question came before the Supreme Court as to whether the provision of the last cited act would reserve the land within the claimed limits of a fraudulent grant. The court said, page 765:

"This section expressly excludes from pre-emption and sale all lands claimed under any foreign grant or title. It is said that this means 'lawfully' claimed, but there is no authority to import a word into a statute in order to change its meaning. Congress did not prejudge any claim to be unlawful, but submitted them all for adjudication."

It is thus seen that the validity or invalidity of the claim can in no respect affect the question of the reservation, where claim is made and investigation is pending. In fact, the invalidity cannot be ascertained until after adjudication, whilst the reservation was intended to be an actual subsisting prohibition against intrusion upon the claimed lands, until an opportunity was afforded the parties for a judicial hearing and investigation. Necessarily, then, to effectuate fully its purpose, this prohibition was intended to operate as soon as "claim" was made to a particular tract of land before the surveyor general, for it was as important to protect it from intruders during his investigation as that of Congress.

I have therefore no difficulty in deciding that this is a case of statutory reservation, which operated *propio vigore* upon the land claimed as soon as claim therefor was made before the surveyor general, and withheld the same from other appropriation until disposed of by direction of Congress; and that it is not in the power of the executive to change, modify, or revoke the restoration thus made. * * *

The act of 1854 created a statutory withdrawal, which attached instantly to land claimed before the surveyor general, and was co-extensive with that claim; nothing that the land officers may do can in any way affect the validity, the extent or effectiveness of said withdrawal, which being established by Congress is subject to its action alone. What the Commissioner or surveyor general might do in the way of defining the extent of the reservation, whilst effective, perhaps, as notice to the public at large, could in no way add to or take from the force and effect of the reservation made by Congress, or prejudice the rights of the claimants.

It is not seen that the act of March 3, 1891 (26 Stat.

854), establishing a court for the settlement of private land claims, has any particular bearing upon the matters herein discussed. As shown, the act of 1854 provided that upon the institution of proceedings before the sur veyor general, the claimed lands should be reserved until the final action of Congress. The act of 1891 repeals that portion of the act of 1854 referred to, and hereafter there will be no such proceedings before the surveyor general and no coincident statutory reservation, But the repealing act does not, either by expression or necessary implication, revoke or annul the statutory reservations in force at the time of its passage. In my opinion, every legal intendment is that said reservations should remain in full effect until the claims they protect are disposed of in accordance with the provisions of the new act."

The principles thus laid down by the Secretary to guide the Department, were announced in connection with the consideration of a grant located in Arizona and in the Gadsden purchase. Two years later the Commissioner of the General Land Office had under consideration the Canada de Cochiti grant, which is involved in our contention here, and discussed the question of reservation in a letter to the surveyor general of New Mexco under date of January 17, 1895. This was after the decision of the Court of Private Land Claims, and about 60 days before the case had been appealed to this court. Among other things the Commissioner says:

"The only question before me, however, is that of the reservation of the tract originally claimed, until the Court of Private Land Claims is through with the case, under the principles enunciated by the Secretary of the Interior in the 'Tumacacori y Calabazas' claim. (*Supra*).

However desirable it might be to restore to the public domain some 100,000 acres of land, I am of opinion (after careful consideration of the matter) that to take the action recommended by you in this case would be premature.

You state that the case is not (or had not last October)

become final. The Land Department ought not, therefore, to interfere in the matter, *pendente lite*.

This office is not informed whether the grant claimants have filed in the court a motion for review of its decision in the premises, or taken the case on appeal to the U. S. Supreme Court, under the provisions of the act of March 3, 1891 (26 Stat. 854); or whether the time has expired within which the parties could exercise such right of appeal.

There is nothing before me going to show that the United States has not filed notice of appeal from the confirmatory decree of the court by direction of the Department of Justice.

In fact there is no evidence presented upon which this Bureau would be warranted in ordering the restoration of the lands in question at this time.

When the case shall have become *final*, by operation of law, or by stipulation between counsel for grantees and the U. S. Attorney, and instructions for surveying the claim in accordance with such final decree have been duly approved, and the application to restore a large portion of the lands now reserved in excess of the amount finally confirmed to be 'Canada de Cochiti' claimants (such lands as are, beyond doubt, not to be segregated in the survey under the decree), will be given due consideration by this Bureau."

As further showing that the Land Department has continuously held these private Spanish and Mexican claims to be in a state of reservation until their proper boundaries were fixed by some competent tribunal, see case of Joseph Farr, 24 L. D. 1; The Perrine Grant, 24 L. D. 109; The A. & P. R.R Co. *v.* Fisher, 1 L. D. 392, a case where the R.R Co. claimed the lands which fell within its granted limits but were within the limits of a Spanish claim, which, at the time the railroad grant was made was in process of litigation. In the decision in this case, Secretary Teller, alluding to the case of Wilcox *v.* Jackson, 13 Pet. 498, uses this language:

"The substantial fact in the case cited was that at the date when the railroad right became effective the land was claimed, in the proper tribunal, to be a part of a Mexican grant, and that that claim was *sub judice* pending the adjustment of the same. Now, if this be so, in such a case where the claim was found to be a forgery and absolutely rejected by reason of having no grant as a basis therefor, then, *a fortiori*, does the doctrine therein enunciated obtain in this case, where the grant is unquestionably valid, the same having been confirmed by Congress by express reference to certain original title papers of record in the office of the surveyor general of California, upon whom the duty of surveying the rancho in accordance with such papers was imposed, the issuance of patent for the lands thus surveyed being conditioned upon the approval of such survey by the Commissioner of the General Land Office."

In Whitaker *v.* S. P. R.R Co., 3 L. D. 459, it was declared that until the title to a floating grant vests in the grantees all the lands comprised within the claimed limits of the exterior boundaries thereof are held in reservation for the benefit of the grant.

These citations and quotations sufficiently show the practice of the Land Department and the reasons on which such practice is based. While it is true that some tracts of land lying within private grants have been patented to settlers and others, yet such sales were invariably inadvertences resulting largely from want of knowledge of the claimed boundaries. Congress recognized this, and in the act of 1891 *supra*, it provided that where the final decree disclosed that such sales had been made within the actual boundaries of the grant the outstanding patent should be considered as validated, and the owner of the private claim should be properly paid from the United States Treasury for his loss. Such sales and the remedial legislation concerning them only emphasize the understanding of both

Congress and the executive that the grantee of a Mexican grant is entitled under the treaty and laws to have his claim reserved until his title is finally fixed by decree.

It, then, seems perfectly clear that under the treaty with Mexico and the law of 1854, the Canada de Cochíti grant stood in reserve when the plaintiff and his associates took possession of the tract in question July 10, 1893, and remained in reserve when this suit was begun.

Let it be added to the reasons given above showing that this grant was reserved, the further reason that the title to the whole claim was in litigation on July 10, 1893, when plaintiff went into possession of the tract in question, and still remained in litigation when this suit was instituted and tried in the district court. The suit of the claimants to the grant was begun in the court of private land claims March 2 and 3, 1893, the decree of that court was rendered September 29, 1894, the case appealed to this court March 11, 1895, and decided here May 24, 1897. Even this latter decision was not final, as the lower court was directed to more clearly define one of the boundaries. We are not informed when this was done, but until it was done the Cochiti grant was in litigation.

Now, in Newhall *v.* Sanger, 92 U. S. 761, L. ed. Bk. 23: 769, the question seems to be well settled that while the title to claims of this character is in litigation for the purpose of settling the rights of the grantee, the whole area claimed is reserved from appropriation of any kind, and no part is "public lands" or "lands subject to sale."

Therefore, if we are right in this contention, the Supreme Court of New Mexico was in error in holding otherwise, and the trial court was in error in requiring the plaintiff to prove that he complied with the mining laws as to monuments, sinking of shaft, recording of notice, &c., as a requisite to his holding possession.

II.

Our second contention is that while the plaintiff was properly and peacefully in possession he was wrongfully ousted by the defendants as the result of a conspiracy and fraud, and we were denied the right of making proof of this before the jury.

Neither party could make a legal mining claim, the lands being in reserve. Kendall *v.* Mining Co., 144 U. S. 658, L. ed, Bk. 36: 583. Hence monuments, notice, discovery-shaft. &c., would avail nothing to the occupant when the reservation was withdrawn. All these would count for nothing towards establishing a legal lode claim. But if a party was found in actual possession when the reserve was terminated he could then perfect his claim by complying with the mining laws of the Territory and the United States, to the exclusion of all others. He would be held to be the discoverer of the lode or vein, and would then be allowed the statutory time to further comply with the law by posting notice, sinking shaft, &c. Hence the right of possession in this case was a valuable right.

And the owner of the true title, or the claimant to a title in litigation, not objecting, the courts regard the better right, as between the parties, to be vested in the first possessor. Bird *v.* Gibson, 70 Am. Dec. 617; Plume *v.* Seward, 60 *id.* 601; Weimer *v.* Lowry, 11 Cal. 104, and Bequette *v.* Canfield, 4 Cal. 278.

Neither does continuous *possessio pedis* apply to mines as to agricultural lands. Atwood *v.* Fricott, 17 Cal. 37; English *v.* Johnson, *id.* 107; Blanchard and Weeks on Mines, 107–172; Morton *v.* Solambo, 26 Cal. 527.

Then the prior discovery and possession by Pilkey of the mine was sufficient possession and title on the part of the plaintiff to sustain ejectment against the defendants as in-

truders thereon—they having no better title. Comp. Laws N. M. Secs. 1570, 2218, 2258, and 2263; Deemer *v.* Falkenberg, 4 Gildersleeve, 149; New Mexico, &c., *v.* Crouch, *id.* 293; Anderson *v.* Gray, 25 N. E. Rep. 843; Christy *v.* Scott, 14 How. 282; Corgell *v.* Cain, 16 Cal. 567; Wilson *v.* Fine, 38 Fed. Rep. 792.

And, of course, the possession of one tenant in common is the possession of his companions, and the law assumes and requires that each shall be true to the other. Mining Co. *v.* Taylor, 100 U. S. 37; Campbell *v.* Campbell, 13 N. H. 483; Kinney *v.* Slattery, 51 Ia. 353, and Miller *v.* Myers, 46 Cal. 535.

Therefore, putting Fagaly in possession, and denial by Pilkey of plaintiff's rights, would constitute an actual and fraudulent ouster of plaintiff. Sedgwick and Wait on Trial of Title to Land, p. 163, Sec. 277, and citations there given, and Barnitz *v.* Casey, 7 Cranch, 456.

With these points in mind, we then urge that the questions of conspiracy to defraud plaintiff of his property, and of his alleged abandonment of his property, were each questions of fact for the jury exclusively, under proper instructions from the court. Russell *v.* Post, 11 Sup. Ct. (N. M.) 353; Preston *v.* Bowers, 13 Ohio St. 13; Comrs. *v.* Brown, 14 Gray, 419; Richardson *v.* McNulty, 24 Cal. 339; Taylor *v.* Middleton, 67 Cal. 656; Myers *v.* Spooner, 55 Cal. 257; Avery *v.* Clemons, 18 Conn. 306, and Mallett *v.* Uncle Sam Co., 1 Nev. 194, *id.* 215. Also see Hammer *v.* Garfield Co. 130 U. S. 291, L. ed. Bk. 32: 964, as to what constitutes possession and forfeiture and abandonment of mine claims made on the public lands.

Now, upon the trial of the case in the district court, before the jury, the plaintiff offered to show that while he and his associates, Ben. Johnson and Pilkey, went into possession of the premises on the 10th of July, 1893, the conspiracy between Pilkey and some of the other defendants was concocted as early as September following, and possession actu-

ally taken by Fagaly, on behalf of his co-conspirators, Pilkey, Walker, Leeds, and J. Johnson, during that month. The judge refused to allow any evidence tending to show fraud on the part of the defendants to go to the jury. He did this on the theory that the ground in dispute was public lands subject to appropriation for mining purposes, and that plaintiff had not complied with the law requiring eight monuments to be placed about the claim to mark its boundaries, a shaft to be sunk on the lode 10 feet deep, and the notice to be recorded, all within three months after notice of discovery, holding that the three months having expired before these things were done, and the notice of the defendants having been posted after the expiration of such three months, was conclusive evidence of abandonment on the part of plaintiff and legitimate entry by the defendants. In a word, the trial court held hard to a theory that the land in question was subject to the provisions of section 2319 of the Revised Statutes of the United States and the mining laws of New Mexico, and hence the discoverer of a lode could only maintain possession by putting up monuments, &c., within three months, and failure to do these things was abandonment.

Upon this theory he refused all evidence tending to show that while plaintiff was depending upon his co-tenant, Pilkey, to hold and keep possession, the defendants named above had conspired with him to defraud the plaintiff, and had actually taken possession even before the said three months had expired.

Now it is held in Gregg *v.* Sayre, 8 Pet. 244, L. ed. Bk. 8: 932, that it is an admitted principle that a court of law has concurrent jurisdiction with a court of chancery in cases of fraud. And in Clements *v.* Nicholson, 73 U. S. 299, L. ed. Bk. 18: 786, that "where the fact of fraud is established in a suit at law, the buyer loses the property without reference to the amount or application of what he has paid, and he can have no relief either at law or in equity."

Justice Story, in delivering the opinion in United States *v.* Amistad, 15 Pet. 518, L. ed. Bk. 10: 826, declared that: "Fraud will vitiate any, even the most solemn transactions, and any asserted title to property, founded upon it, is utterly void." In League *v.* Young, 11 How. 185, L. ed. Bk. 13: 657, this language is used: "Judgments as well as grants obtained by fraud or collusion are void, and confer no vested title."

In Lincoln *v.* Claflin, 74 U. S. 132, L. ed. Bk. 19: 106, opinion by Justice Field, the following, in substance, was held:

This was a case brought to recover damages for fraudulently obtaining property. The declaration alleges a combination between the defendants pursuant to which one of them purchased a large amount of goods upon a false and fraudulent statement of his means in business, and the other defendant disposed of them within a few days afterward at less than cost, the whole proceeding being taken with intent to fraud the vendors. The case proceeds upon the theory that the title to the goods never passed to the defendants, but remained in the plaintiffs, from whom they were fraudulently obtained. In the trial of the case the court held that it was sufficient to show that the defendant who received and sold the goods, with knowledge of fraud, became a party to it; that subsequent participation in the fraud was as effective to charge him, as pre-concert and combination in its execution. This court holds that in this position the court below was not in error. The opinion adding: "If, knowing the fraud contrived, he aided in its execution, and shared in its proceeds, he was chargeable, for all its consequences, and could be treated and pursued as an original party."

Plaintiff in error therefore insists that the premises in question not being subject to the mining laws there could be no question of abandonment because the plaintiff had not complied with the said laws. Hence the whole question of fraud as tendered on the trial should have been submitted to

the jury. But even if the premises had been located on public lands, the offer to show that in pursuance of the fraudulent agreement the conspirators went into possession of the mine as early as September (a considerable time before the statutory three months had expired), the evidence should have been admitted.

In New Mexico the rule is established beyond controversy that "it is error to withdraw from the jury the determination of a disputed fact in issue. Where there is a substantial conflict of testimony, it is for the jury and not for the court to decide."

Lockhart *v.* Wills (N. M.), 1897, 50 Pac. Rep. 318—and cases cited; Chaves *v.* Chaves, 3 N. M. 306. In Montclair *v.* Dana, 107 U. S. 162, L. ed. Bk. 27: 436, this court said: "The jury may be controlled in their determination of a question by a peremptory instruction, if the testimony is of such a conclusive character as would compel the court, in the exercise of a sound discretion, to set aside a verdict if one were returned in opposition to such testimony." Also see Ins. Co. *v.* Doster, 106 U. S. 32, L. ed. Bk. 27: 65.

In this case there was much conflict in the testimony that was admitted as to possession and abandonment, and hence the case should not have been taken from the jury, as shown by the cases cited. But in addition to this, we urge that the statements made by Pilkey, Fagaly and Walker, respectively, while in possession, or conspiring to get into possession, of the premises, were admissible in evidence for various reasons—as declarations against interest, as showing the character of defendant's title, as declarations of conspirators made during the pendency of a fraudulent combination. In addition to citations already given touching more or less on this point, we call attention to the following: 2 Wharton on Evidence, Sec. 1156, 1 Greenleaf, on Evidence, 109; Rowland *v.* Philadelphia, 28 At. Rep. 102, Ward *v.* Cochrane, 71 Fed. Rep. 135, and Martin *v.* Bonsack, 61 Mo. 559.

We therefore insist that the District Court erred in refusing to admit the testimony of Fergusson and others showing, or tending to show, a conspiracy of the defendants, or some of them to defraud; also erred in taking the case from the jury; and that the Supreme Court of the Territory erred in deciding that the Canada de Cochiti grant, covering the premises in question, was not reserved at the time the plaintiff took possession, and not reserved from that date up to and at the time the suit was begun.

J. H. McGOWAN,
Attorney for Plaintiff in Error.

In the

SUPREME COURT

OF THE

United States.

OCTOBER TERM, 1900.

Henry Lockhart,
Plaintiff in error,
vs.
J. A. Johnson, Julia A. Johnson, his wife; Charles Pillsbury & Co.,
Defendants in Error.

In error to the Supreme Court of the Territory of New Mexico.

BRIEF OF DEFENDANTS IN ERROR.

WM. B. CHILDERS,
Attorney for Defendants in Error.

No 147.

SUPREME COURT

OF THE

United States.

OCTOBER TERM, 1900.

Henry Lockhart,
Plaintiff in error.

vs.

J. A. Johnson, Julia A. Johnson, Charles Pilkey, the Unknown Heirs of Lee Walker, deceased, Wm. B. Childers, Edward W. Dobson, Charles Bonsall, and the Washington Gold & Silver Mining Company.
Defendants in Error.

NO ASSIGNMENT OF ERRORS IN THE RECORD

The plaintiff in error has not annexed to the writ of error any assignment of errors. Neither is there any specification of errors in the brief. It is true he has copied into the brief the assignment of errors filed in the Territorial Supreme Court on the hearing of the

cause on writ of error in that Court, but that is not the equivalent of the assignment of errors required by the statute, and the rules of this Court. Counsel for plaintiff in error should therefore not be heard, under the rule. A motion to dismiss might well have been made by defendants in error. Not having made such a motion, however, defendants in error submit to the Court the determination of the question whether or not the Court will proceed to hear counsel, and examine the record without such compliance with the statute and the rules. This Court has very plainly announced that under such circumstances it will not examine a case and dismissed it, without a motion to dismiss being filed.

Benites vs. Hampton, 123 U. S. 519.

STATEMENT AND BRIEF FOR DEFENDANT IN ERORR.

This is a suit in ejectment, and was originally brought by the plaintiff in error as plaintiff below against James Q. Wills, H. C. Leeds, J. A. Johnson, Julia A. Johnson, his wife, Charles Pilkey, Samuel Dunlop, Lee Walker, William B. Childers, Edward W. Dobson, and Charles Bonsall, Receiver, By death of parties, Lee Walker and Samuel Dunlop, and transfer of other interests in the property. The case was finally decided in the Supreme Court of New Mexico with the parties defendant as stated in the above entitling of the cause.

The suit was brought to recover possession of a mining claim called the "Sampson." The case was tried in the District Court for Bernalillo County and

taken to the Territorial Supreme Court by writ of error, and the judgment upon the first hearing was reversed. A motion for rehearing was then filed and allowed. The plaintiff in error's statement that this motion for rehearing in the Supreme Court "was not considered until a change of Federal Administration had resulted in a complete change in the personnel of the Court, when the motion for rehearing was allowed and the case again heard, the former decision reversed and the decree of the trial court affirmed," while it is immaterial, is not a correct statement of the facts. The motion for rehearing was allowed by the same court which rendered the first decision and before there had been a single change in its personnel.

Record, pg. 273.

Plaintiff in error's statement of facts sets out a part of a contract entered into by the plaintiff with the defendant Pilkey, and one Ben. Johnson. This contract is very remarkable in several particulars which plaintiff fails to set out. By reference to the evidence and to the terms of the contract, it will be observed that it was made specially with reference to one mining claim, called the Mammoth, which had already been discovered by Pilkey. (Record, pg. 14.) The whole consideration relates to that one claim, and all the tools, powder, fuse, etc., to be furnished under the contract by the plaintiff in error and Ben. Johnson to Pilkey were to be furnished and used on that one claim. (Record, pgs. 41, 42, 43, 45.) The contract provides: "*It shall be at the option of said second parties* (plaintiff in error) *to continue working or abandon any claim located at any time they deem proper.*"

(Record 45.) It also provides that any "*concealment of a discovery or failure to locate of a valuable mineral claim or claims for the purpose of evading the terms of this agreement and defrauding the said second parties* (plaintiff in error) *shall work a forfeiture of any right or interests direct or indirect that such first party might have or afterwards obtain to and for the benefit of the said second parties.*" These features of the contract may become important in the consideration of the evidence in some aspects of the case.

On the 10th of July, 1893, the defendant Pilkey posted a mining location, in the usual form, describing a mining claim 1500 by 600 feet, by reference to monuments of stones, and posted the same in a pile of rocks twelve or fourteen inches high, against a pine tree. The evidence clearly shows that the only monument referred to in the notice, which was ever put on the claim, was that in which the notice was posted. The plaintiff testified as follows:

Q. At the time you speak of, when this copy of the notice was handed to you by Pilkey, what had Pilkey done or what was he doing with reference to the lead described in the notice?

A. He had put up a monument of stone referred to, location notice, but at that time he had done no work on the claim.

Q, That was the latter part of August or the first of September?

A. About the first of September.

Q. State what, if anything, was said between you and him with reference to complying with the mining laws or regulations as to sinking a hold and recording this location notice and marking the boundaries.

A. I had previously written him distinctly in regard to (interrupted)—

Q. Never mind about what you had written him. At this time state what passed between you and him on that occasion.

A. I called his attention to the necessity of locating the claims properly and doing the work within the specified time; we examined the ground, picked it over and broke some of the rock, and he in answer to my suggestion in regard to the necessity of doing the work in time, stated specifically in regard to that claim that he knew of a soft place on it where leads cropped up and he could get a 10-foot hole down from the top of the ledge with very little work.

Q. And what with reference to doing it before October 10th?

(Objection as leading.)

Q. Please state all that Pilkey said on that occasion with reference to complying with the requirements of the law and to this claim within the time required by law.

A. He said he would have the work done all right in time.

Q. What work?

A. I do not pretend to give his exact language because I do not remember, I give the substance of our understanding in regard to those matters.

Q. That is enough: That he would have what work done in time?

A. The location work.

Q. Was anything said as between you and him as to what work was required to be done?

A. I do not know that there was at that time for the reason that I had explicitly stated to him prior to that time the necessary work and matters to be attended to in connection with the proper location of the mining claim.

Q. Do you mean in that letter of August 11th, 1893, which you have produced here?

A. I do.

Q. Well, in stating that he would have the work done all right to what did he refer if you know?

Objection as leading, and that the witness should

state what was said.

The court tells the witness to state the language as near as he can that was used.

A. In referance to the work the conversation took place on the Sampson claim and all talk with reference to work or anything else that occurred referred to that claim, and I distinctly recollect from the fact that I anticipated it would take considerable time in September, if not nearly the entire time to complete the work mapped out on the Ellen L., he would have very little time to do the work on the Sampson and I desired to impress on his mind that that work would have to be done prior to the time of the expiration of the location notice. That brought up his statement in regard to having found a place on the claim where he could do the work so readily.

Q. You say that you went up and down the lead, yourself, Pilkey and Deidrick; what lead do you refer to?

A. The Sampson lead.

Q. Did you go over its whole length?

A. I did.

* * * * * * * * * *

Q. Were you up there afterwards, after the first of September, whilst Pilkey was still in possession?

A. Not while he was in possession for us.

* * * * * * * * * *

Q Please state what you saw else upon this claim with reference to appropriation or possession of it.

A. Well, as to that question I will say, I didn't see any corner stakes. (Record, pages 22, 23, 24.)

From the plaintiff's own testimony it will be seen that the only possession up to the first of September, 1893, that Pilkey had ever taken of the claim, was to place a location notice in this pile of stones; no other monuments were placed upon the claim and no work was done. Plaintiff states that he never saw the claim after the first of September, until several weeks after

a location notice was posted upon the claim in the name of F. Fagaly, Lee Walker, H. C. Leeds and J. Johnson, which notice was posted on the 23d day of October, 1893, and possession taken under the same. It is under this last location that the defendants in error claim.

Plaintiff in error next visited the claim in March or February, 1894, after the locators, under whom the defendants in error claim, had located the claim and done a very considerable amount of work thereon, shipping a car-load of ore from it, etc. He distinctly states that he was only there about the first of September, 1893, and that the location monument, blazed tree and prospecting work was all the evidences of possession which he saw. In his testimony he says :

Q. How much prospecting work did you see and where was it ?

A. I said it was on the ledge or lead.

Q. How much of work of that kind was done, please describe that.

A. We, there was considerable of it where a man had gone along over the lead where float was and broken pieces of rock and picked around and exposed the character of the quartz.

Q. Broken off pieces of rock then?

A. Yes, sir; and removed from their original resting place.

Q. There was no holes of any kind sunk on the claim at that time?

A. No, sir; not that I know of.

Q. That was the extent of the work you saw done?

A. Yes, sir.

Q. That work, which you call prospecting work, and this monument and blaze on the tree and this location notice was all the evidence of possession you saw there ?

A. Yes, sir; except Mr. Pilkey, he was an evidence of possession.

Q. Yes, but he went away when you went away; he went off the claim when you went away.

A. I understand he is there still.

Q. I am not asking you about that; you know that is not in answer to my question. Was Mr. Pilkey on that claim residing or living there or simply went up there to show it to you and then returned to his cabin when you went back?

A. Mr. Pilkey was not living on the claim, and after we had gone over the claim we returned to the cabin with Mr. Pilkey. When we left there we left Mr. Pilkey on the Ellen L. claim.

(Record, page 66.)

Pilkey's testimony on the question of possession is as follows; after testifying that the plaintiff received a copy of the location notice when he visited the claim, about September 1st, he says:

Q. Is that a copy of the one you put on the claim?

A. Yes, sir; it is.

Q. Where was the location notice posted on the claim?

A. Why, it was not posted; it was a little pile of rocks throwed up that way and stuck in so it would not blow away and a large rock put over it to keep it from getting wet; I expect a dozen rocks or so of the ledge rock. Mr. Lockhart was there and I showed him and told him the location is in that monument. He never saw it on the tree; there never was one on the tree.

Q. Did he look at it?

A. No, sir; he didn't care; not of my knowledge; I was there present all the time.

Q. What was done to this tree?

A. Well, there was nothing done to the tree more than it had the bark knocked off it. I didn't. I know the turpentine had run down on the place where it was barked.

Q. What monument, if any,—in the first place describe that monument in which the location notice was posted.

A. It was laid up agin, it was built agin the tree—where there was a little trail, a trail that went up the ridge and close to this tree, built right beside that, and it was well nigh over a dozen rocks, small ones. (Witness illustrates with his hands) and this (the location notice in his hands) was put in that monument.

Q. What other monument did you erect on that claim?

A. No other, sir; that is all the work I have ever done on it under this location notice or any other.

Q. What other work, if any, monument or anything else, was done on that claim between the 10th of July and the 23d of October, 1893?

A. There was nothing else at all, nothing but that I say.

(Record, page 144.)

The wife of Pilkey testifies to the same effect, that nothing else was done upon the claim between the 10th of July and the latter part of September, when she and her husband finally returned to Albuquerque; that they passed over the claim some three or four times, looking for horses. (Record, pages 179-180.) See also Leeds' testimony, (page 210 of the record,) and also that of Bonsall, Receiver, (Record, page 214,) which shows that no work was done upon the claim, except that which was done under the Washington location after the 23d of October, 1893.

From the evidence, it will thus clearly be seen that nothing was done upon this claim which would have amounted to actual continuous possession between the 10th day of July, 1893, when the "Sampson" location notice was posted and the 23d day of October following, when the Washington location notice was posted.

The Territorial statute provides that "any person * * desiring to locate a mining claim upon a vein or lode * * must distinctly mark the location on the ground so that its boundaries may be readily traced, and post in some conspicuous place on such location, a notice in writing, stating thereon, the name or names of the locator or locators, his or their intention to locate the mining claim, giving a description thereof by reference to some natural object or permanent monument, as will identify the claims, also within three months after posting such notice, cause to be recorded a copy thereof in the office of the recorder of the county in which the notice is posted." (*Compiled Laws, N. M., 1897, Sec. 2286, Record, page 289.*) It also provides: "That the locator or locators of any mining claim * * shall within ninety days, from the date of taking possession of the same, sink a discovery shaft upon such claim, to a depth of at least ten feet from the lowest part of the rim of such shaft at the surface, exposing mineral in place, or shall drive a tunnel, adit or open cut upon such claim, to at least ten feet below the surface, exposing mineral in place." (*Compiled Laws, N. M., 1897, Sec. 2298. Record, page 289.*)

Section 2 is as follows: "The surface boundaries of all mining claims hereafter located, shall be marked by four substantial posts or four substantial monuments of stone set at each corner of such claim. Such posts or monuments of stone shall each be plainly marked so as to indicate the direction of such claim from each monument of stone or posts." Compiled Laws, 1897, Sec. 2299. Record, page 289.

The plaintiff offered the evidence of several wit-

nesses, among them Fergusson, Neeland, Stella Metz and Ellen L. Lockhart, for the purpose of proving that Pilkey, the prospector, had entered into a conspiracy with one Frank Fagaly and Levy Walker, two of the locators of the "Washington" claim of the defendants, and agreed with them to fail to do the things required by the statute, that is to say, ten feet of work, the erection of proper monuments and the recording of the location notice within three months from July 10th, the date of the "Sampson" location notice, so that the ground would be vacant and open to location by them on October 10th. It was also claimed that in accordance with this understanding the Washington was visited by Fagaly prior to the 10th of October, but actual possession was not taken and the notice of location posted on it until the 23d of October. It is further claimed that when it was located, Levy Walker was to have two-fifths undivided interest in the claim, one-fifth for himself and one-fifth for Pilkey. The evidence so offered consists of declarations claimed to have been made to those witnesses by Fagaly and Walker at different times. This evidence was ruled out by the Court upon the ground that as no valid mining location had been shown by the plaintiff, the only issue was as to whether the plaintiff was in actual possession at the time the Washington locators entered and made their location. (*Record, page 132.*) "The fact that Pilkey and Fagaly were scheming all summer, and Pilkey deceiving him, does not affect the quality of Lockhart's acts as to abandonment. * * It is simply a question whether Lockhart prosecuted the work on the claim according to the nature of the property he was

endeavoring to hold, or did not. If he did prosecute the work, then he held it; if he did not prosecute the work, he did not hold it." (*Record, pages 244-5.*)

The general statemeut of the offer of this class of evidence in the brief of plaintiff in error is based on the written offer in the record, page 248-9, and on page 11 of the brief. Such an offer is not a proper way to to raise the question of the admissibility of evidence. Several of the witnssses referred to in this offer were placed upon the stand and examined in the absence of the jury, and an examination of the evidence will show that not one of them stated that either Fagaly or Walker had ever taken any possession of the claim prior to October 10th. It will be necessary to examine the testimony of several of these witnesses separately as to the competency and relevancy of the statements of Walker, Fagaly and Pilkey attempted to be shown by them. The testimony of witness Fergusson, was objected to upon the additional ground that it was a privileged communication, he being Fagaly's attorney. By none of these witnesses was any substantial fact offered to be shown but only declarations of the parties.

The question as to whether or not the land was subject to location under the mining laws was not raised in the district court. The court did not try the case upon the theory of forfeiture for non-compliance with the mining laws as stated in brief of plaintiff in error. (*Plaintiff's brief, pafs 30.*) The extract from the trial judge's rulings shows that he held the issue to be whe her there had been a *continuous actual* possession of a defined mining claim up to the time that possession was taken by the locators of the Washington, or whether there had been an abandonment by the Samp-

son locators. On the conclusion of the evidence, upon the ground that there was not sufficient evidence of such possession to sustain a verdict for the plaintiff, he instructed the jury to find for defendants. The mining laws were applied by the trial court in reaching this conclusion by analogy. The ground in controversy was located within the limits of the private land claim known as the Canada de Cochiti Grant, as claimed by the alleged owners of that grant. At the time these locations were made, a suit was pending in the Court of Private Land Claims for the confirmation of the grant. It was confirmed on the 29th day of September, 1894, and the premises in controversy were not included within the limits of the grant as confirmed. An appeal was taken from the Court of Private Land Claims to this Court, and the decree of the first court modified by this Court. The grant, however, as finally confirmed did not include the premises in controversy. *Whitney vs. United States, 167 U. S., 529.* The status of these lands as to the mining laws was not considered until the final decision of this cause. (*Record 282.*) *Lockhart vs. Wills, 9 N. M., 344.* An examination of the evidence will show that all the parties to this cause thought until the winter of 1894, when the rights of all parties had already become fixed, that the premises in controversy were located upon the *unclaimed public* domain of the United States, and were subject to the mining laws. Plaintiff states that the first knowledge he had that the claim was within the Cochiti Grant, as claimed, was in the winter or spring of 1893-4. (*Record, 35.*) Pilkey also thought it was government land. (*Record, 163-4.*)

As already stated, there were four other mining

claims located by Pilkey in the names of himself, plaintiff and Ben Johnson. The location notices for these claims were all filed for record by the plaintiff himself. Not one of them was filed by Pilkey. Three of them were filed within the three months after possession was taken and before any notice that the statutory requirements had been complied with. All three claims were filed on the same day, July 11th. (Record, page 52, also page 238.) The other claim, the Columbus, was recorded on the same day that the Sampson was. (Record, pages 149-150.) No work was ever done on the Columbus. He had received a copy of the location of the Sampson the latter part of August, or the first of September, when he said he was there and examined the claim. Mrs. Pilkey says August 20th. (Record, 179-189.)

Pilkey asked him to send provisions, and let him know from the assay if the work was worth doing. This plaintiff never did. He pretended that he was waiting for Pilkey to notify him that ten feet of work was done on the Sampson, (Record 52.) before recording. Yet he never was so notified. (Record 52-53.) No work had been done on the claim up to September 1st, when Lockhart received a copy of the location notice. (See Record, pages 22, 23.)

On or about ~~August~~ October the 5th, Pilkey came to Albuquerque—about two days' travel from the claim, by private conveyance, demanded pay for his work on the Ellen L., and a copy of the assay of the ore, which plaintiff had taken from the "Sampson." Plaintiff refused to pay him for the work or satisfy him about the assay. (Record, 63-69-70.) Johnson gave him an order on the assayer for the assay, and agreed to pay

him for the work he had done, which he afterwards did. Pilkey offered to take Johnson to the claims so he could relocate them or hold possession of them. (Record, 145-6-7.) The fact that Pilkey notified the plaintiff and Ben Johnson of the fact that he fully repudiated the contract, and would have nothing further to do with the claims as early as October the 6th, is fully corroborated by the testimony of Ben. Johnson, and a disinterested witness, W. A. Skinner. (Record, 180, 181, 182, 200-208.) The statement of Pilkey as to this is undenied and fully corroborated. (Record 171.)

Pilkey never returned to the mines after he came to Albuquerque and repudiated the contract, until November. Both he and his wife so testify, and it is undisputed, except by the evidence of declarations of Fagaly made to Fergusson, which was excluded by the Court. (Record, 147-8, 178.)

Plaintiff, however, testifies that he thought matters had been smoothed over, and stilll relied npon Pilkey to perfect the location, although both he and his co-partner Johnson, had been notified by Pilkey on October 5th, that he, Pilkey, had repudiated the contract and would do nothing more under it. (Record, pages 253, 255.) The contract was rescinded by Pilkey, and it is not pretended that any work was done by Pilkey after October 6th. Johnson paid for work done on one of the claims, the Ellen L., prior to October 6th, 1894. (Record, pages 208-9.) Plaintiff did not record the notice until after he knew the "Washington" claim had been located and a car-load of ore had been hauled to the railroad and shipped from it. The notice was recorded on December 9th. (Record, 62.) Plaintiff

himself attended to recording the location notices, and called Ben. Johnson's attention to it, after the recording. (Record, 201-2.)

The foregoing facts are undisputed, and are fully sustained by the record. It was from a consideration of these uncontroverted facts that the trial court was led to instruct the jury to find for the defendants. The trial court held that the plaintiff had to recover on a naked prior possession, that the evidence failed to show an actual continuos possession, but on the contrary showed that Lockhart and Johnson had abandoned the claim, and that the recording of the location notice of the "Sampson" and the Columbus was due alone to the fact that the "Washington" locators had opened up a very promising vein and were shipping ore out of it. The location notice of the "Columbus" was filed at the same time, and plaintiff admits that no work had been done on it.

Judge Parker in his opinion reaches the conclusion, that "Plaintiff failed to show, or offer to show that he was prevented in any way from perfecting his location by reason of any unlawful entry and ouster by defendants, prior to the expiration of the ninety days, and he showed the location under which defendants testified (claimed) to have been made after the ninety days expired." The Court in the last opinion dissents from the view expressed by the Supreme Court on the first hearing as to the materiality of the rejected evidence. The Court in the second opinion, it is true holds that the ground was subject to location under the mining laws and discusses the case from that standpoint. The trial Court, however, applied the same principles to the case by analogy. Plaintiff had testified that he

thought the claim was on government land and showed that he was entirely familiar with the requirements of the mining laws, and made no effort whatever to comply with them. Neither he nor Ben. Johnson made any effort to go to the claim and commence compliance with the law. Although admittedly notified by Pilkey that the work had not been done, and although Pilkey offered to take Johnson and put him in possession. This was on October 6th. Four days were ample time to go a distance of about 75 miles, fifty of which can be traveled by railroad. He certainly could have recorded the copy of the location notice as well in October, as in December. These are the undisputed facts which induced the trial Court to give the instruc tion to find for the defendants.

The Supreme Court on the second and final hearing of the case held that the land was not reserved from entry because a suit for confirmation of a grant, within the claimed limits of which is was situated, was pending in the Land Court. If subject to location under the mining laws, the failure to do the work, properly monument the claim, and record the location notice operated as a forefeiture, whatever the reason for the failure was, unless it was prevention by physical force or occupancy of the premeises, and the evidence clearly shows that there was no such prevention. If this proposition of law is sound, it fully disposes of the case.

It is immaterial that the trial court applied the mining law by analogy, instead of holding that it was directly applicable, if as a matter of fact, it was either applicable by analogy or directly so. In either view

of the case, defendants in error insist that the Court properly instucted the jury to find for the defendants. We deem it proper and more convenient, however, to first discuss the status under the law, of the ground in question, as to the mining laws:

BRIEF.

I.

The Supreme Court correctly held as to the land in controversy as follows: "There being no reservation of these lands within claimed grants in New Mexico, by treaty, law or authorized act of the executive department (Wolsey vs. Chapman, 101 U. S. 755), we conclude that they are not reserved lands and are 'Lands belonging to the United States within the meaning of section 2319 of the Revised Statutes of the United States.'". In other words that lands within the claimed limits of an unconfirmed Spanish or Mexican grant, in New Mexico, were subject to location under the mining laws of the United States. The stipulation between the parties states that the land was within the limits of the Canada de Cochiti tract, as said claim was surveyed and approved by the surveyor general, June 29th, A. D. 1888. That said private land claim was never confirmed upon the report of the surveyor general; that petitions for its confirmation were filed in the Court of Private Land Claims in 1893, and a decree of confimation rendered in that Court on September 29th, 1894; and that said premises were not included in the boundaries of the grant as confirmed by that Court. Further that an appeal was taken from the

decree of the Court of Private Land Claims to the Supreme Court of the United States, and was pending undetermined at the date of the stipulation, which was signed and filed on the trial of the cause on February 12th, 1896. (Record 31.) A copy of the decree of the Land Court was a part of the stipulation. (Record 32-33.) The reasoning of the Court and the authorities cited are so conclusive, that the defendants in error might solely rely upon the opinion of the Court below. (Record 283.) Lockhart vs. Wills, 9 New Mexico Rep., 344.

We do not understand why the stipulation as to the status of the grant as claimed, and of the premises in controversy, being a part of the record, does not properly raise the question as to the applicability of the mining laws. The New Mexico statute, Sec. 3141 of the Compiled Laws of New Mexico, has never received, and is not susceptible of the construction placed upon it by the plaintiff in error. That statute is as follows:

"The Supreme Court in appeals or writs of error shall examine the record, and in the facts therein contained alone shall award a new trial, reverse or affirm the judgment of the district court, or give such other judgment as to them shall seem agreeable to law."

Plaintiff in error seems to think that although the ruling of the Court below may have been correct, upon the facts disclosed by the record, in point of law, yet if the trial court failed to give the true reason for its decision, the appellate court can not affirm it. The

Court below on this subject said: "The assigning of a wrong reason for an act by the Court below is not error, if the act done was in law right." citing Wismer vs. Brown, 122 U. S. 214. In that case the opinion concludes as follows: "Our conclusion therefore is that the instruction to find for the defendants was right at all events, for they were entitled to such an instruction on the law of the two years' limitation, whether they were so for the reason assigned by the judge or not." Wismer v. Brown, 122 U. S., 220.

In Evans v. Pike, 118 U. S., 250, the Court also decided that where plaintiffs were not entitled to recover on their own showing, an incorrect charge to the jury did them no injury, and affirmed the case. In another case this Court said:

"Conceding, for the purpose of this opinion, that the court below erred in all the particulars complained of, the errors have done them no harm. Opposite rulings could not have helped them. Their case was inherently defective. The defect was incurable and inevitably fatal. When such a defect exists, whether it be or be not brought to the attention of the court below or of this court by counsel, it is our duty to consider it and to give it effect. This is decisive of the case before us. The defendant in error is entitled to have the judgment affirmed."

Barth vs. Clise, 12 Wall., 403.

II.

The status of the land in controversy as to being subject to location under the mining laws, was properly considered by the Supreme Court, and if its conclusion was correct, settles this case in favor of the defendants in error, and eliminates, as the Territorial Supreme Court said, all the questions raised as to the admissibility of evidence.

Were these mining claims subject to location under the mining laws?

The land in controversy in 1893, when the "Sampson" and "Washington" mining locations were made, was a part of a claimed Spanish or Mexican land grant, which had never been confirmed, and a suit for the confirmation of which was then pending, and which suit subsequently and prior to the determination of this cause in the court below, had been decided adversely to the grant claimants, as to the land in controversy in this cause. The stipulation states that these mining claims were not included within the grant as confirmed. An appeal had been taken to the Supreme Court of the United States, and was pending in that Court at the time of the trial of the cause in the District Court, according to the stipulation. We therefore contend that in 1893, this land being in fact public domain of the United States was subject to location under the mining laws of the United States. The mining laws declare:

"All valuable minieral deposits in lands belonging to the United States both surveyed and unsurveyed are hereby declared to be free and open to exploration ond purchase, and the lands in which they are

found to occupation and purchase by citizens of the United States and those who have declared their intention to become such under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

Revised Statutes of the U. S. Sec. 2319.

Did this land belong to the United States in 1893? That is a question of fact. It had not been determined in 1893. It was so determined in 1894. The validity of a mining location made in 1893 depended alone, under the terms of the statute, upon the fact as to whether the lands were or were not "lands belonging to the United States." The circumstance that the ownership of the lands by the United States had not at that time been determined by any competent tribunal, is wholly immaterial, unless some other statute by its terms excluded them from the scope of the general statute declaratory of what lands, title to which, could be acquired under the mining laws. In a general way, it has been contended, that lands subject, although in fact "belonging to the United States" are not subject to entry under the homestead, preemption or mining laws of the United States. In other words, any claim set up to such lands, as against the United States however unfounded in fact and law, it is claimed at once operates to make them not "lands belonging to the United States," although subsequent adjudication may determine the fact to be that they are "lands belonging to the United States." No such exception can be

read into the statute above quoted, unless some other statute can be cited which renders such a construction necessary.

We will endeavor to show that wherever such lands have been held to be reserved from entry under the mining laws, or the homestead and preemption laws of the United States, there was some specific statute which excepted them. Section 2289 of the Revised Statutes of the United States declares:

"That every person who is the head of a family * * * *shall be entitled to enter one quarter section or a less quantity of unappropriated lands. * * * *"

Section 2257 proviles:

"All lands belonging to the United States, to which the Indian title has been or may hereafter be extinguished shall be subject to the right of preemption under the conditions, restrictions and stipulations provided by law."

We have quoted the foregoing provisions for the purpose of showing the right to enter upon and occupy lands under the mining laws are just as broad as the right to do so under the homestead and preemption laws. Any land subject to entry under the homestead and pre-emption laws, if mineral in character, is subject to location under the mining laws.

The land included in this grant as surveyed by the surveyor general was reserved from sale or other disposal under the povisions of Section 8 of the Act creating the offices of surveyor general of New Mexico, Kansas and Nebraska, passed July 22, 1854, Stat at Large, Vol. 10, p. 308.

This section provided that it should be the duty of

the surveyor general to ascertain the origin, nature, character and extent of all claims to land under the laws, usages and customs of Spain and Mexico, and make a full report on all such claims as originated before the cession of the Territory to the United States, with his decision as to the validity or invalidity of each of the same, which report was to be laid before Congress for such action thereon as might be deemed just and proper, etc., And provided a reservation in the following words:

Section 15 of the Act of Congress, approved March 3rd, 1891, establishing the Court of Private Land Claims, is as follows:

"That section eight of the Act of Congress approved July twenty-second, eighteen hundred and fifty-four, entitled 'An act to establish the offices of surveyor general of New Mexico, Kansas and Nebraska, to grant donations to actual settlers therein, and for other purposes,' and all acts amendatory or in extension thereof, or supplementary thereto, and all acts or parts of acts inconsistent with the provisions of this act are hereby repealed."

Thus the only law which exempted the land in controversy from the operation of the general statute as to what lands of the United States were "to be free and open to exploration and purchase" under the mining laws of the United States, was expressly repealed.

It may be worth mentioning in this connection that the New Mexico Bar Association, after the passage of the Act of 1891, had under consideration the effect of the repeal of Section 8 of the Act of 1854, above quoted, commonly called in New Mexico, the

Surveyor General's Act, and memorialized Congress as follows:

"The fifteenth section of the act provides for the repeal of the eighth section of the Act of Congress of July 22, 1854. That section contained a clause reserving from sale or other disposal all lands included within claims presented to the surveyor general of New Mexico. The repeal of the section also repeals this reservation which can not have been the intention of Congress. We therefore urge the addition of a proviso to section fifteen, in the following language:

"Provided, That all lands included within any private land claim which shall have been filed with any of the surveyors general of the states and territories mentioned in this act, pursuant to the terms of said act, which has not been finally decided on by Congress, and which shall also be filed in the Court provided for by this act within the time limited by section twelve of this act, and all lands included within any private land claim filed in the Court provided for by this act, shall be reserved from entry, sale or other disposal by the United States until finally decided under the provisions of this act."

Congress has never passed the amendment recommended. In the opinion of the leading lawyers in the Territory, there was no reservation of this land in 1893. The cases decided by this Court amply sustain this contention. Several acts were passed for the settlement of French and Spanish claims in the Territory of Louisiana, which contained reservations in these words:

"Provided, however, that until after the decision of Congress on these claims, no tract of land shall be offered for sale, the claim for which had been in due time presented to the Recorder of Land Titles in the district of Louisiana and filed in his office for the purpose of being investigated by the commissioners for

the purpose of ascertaining the rights of persons claiming lands in the Territory of Louisiana."

This act was passed in 1811. This reservation was continued up to the 26th of May, 1829, when it ceased, until it was revived by the act of the 9th of July, 1832.

Thus there was an interval of a little more than three years during which it was not in force. A New Madrid location had been made by the defendant while this reservation was in force, upon a tract filed under the act. In considering the effect of the reservation and the attempted entry of the land, this Court said:

"His location was made on lands not liable to be thus appropriated, but expressly reserved and this was the case when his patent was issued. Had the entry been made or the patent issued, after the 26th of May, 1829, when the reservation ceased, and before it was revived by the Act of 1832, the title of the defendant could not be contested."

Stoddard vs. Chambers, 2 How., 285-318.

No case could possibly be stronger or more pertinent for the purpose of sustaining our contention. We might safely rest upon it. But there are other decisions.

"There can be no reservation of public lands from sale except by some treaty, law or authorized act of the executive department of the government."

Wolsey vs. Chapman, 101 U. S., 755-769.

Decisions of this Court are quoted to sustain the proposition that the pendency of a claim for the confirmation of a Spanish or Mexican land grant or itself

operates as a reservation of the land within the claimed limits of the grant, from entry under the homestead, preemption or mining laws of the United States. An examination of the cases decided by this Court furnishes no support for such a claim.

The case usually quoted in favor of this contention is Newhall vs. Sanger, 92 U. S., 761. It is an authority against such a contention, because the express statuatory provision creating the reservation is referred to in the opinion, as the reason for the Court's conclusion. The question before the Court was whether or not the land included in a Mexican grant then pending for confirmation, passed under a legislative grant to a railway company. The act granting alternate sections to a railroad company declared that the act

"Shall not defeat or impair any preemption, homestead, swamp-land, or other lawful claim, nor include any government reservation or mineral lands, or the improvements of any bona fide settler."

The Court states it as follows:

"And the question arises whether lands within the boundaries of an alleged Mexican or Spanish grant, which was then sub judice, are public within the meaning of the Acts of Congress under which the patent, whereon the appellee's title rests, was issued to the railroad company."

The Court in discussing the question says:

"The status of lands included in a Spanish or Mexican claim, pending before the tribunals charged with the duty of adjudicating it, must be determined by the condition of things which existed in California at the tme it was ceded, and by our subsequent legislation."

The Court then proceeds to discuss the legislation creating the commission to settle Spanish and Mexican grants in California, and the act extending the public land system over California, the pertinent provisions of which are as follows:

Section 6 of "An act to provide for the survey of the public lands of California, the granting of preemption rights therein, and for other purposes," passed March 3, 1853, 10th Statutes at Large, page 240, provides, "that all the public lands in the state of California . . . . . with the exception of lands appropriated under the authority of this act, or reserved by competent authority, and excepting also the land claimed under any foreign grant or title and the mineral lands shall be subject to the preemption laws * * *"

Section 13 of the Act of March 3, 1851, 9th Statutes at Large, 631, creating a commission to settle private land claims, provides, "That all lands, the claims to which have been finally rejected by the commissioners in manner herein provided, or which shall be finally decided to be invalid by the District or Supreme Court, and all lands the claims to which shall not have been presented to the said commissioners within two years after the date of this Act, shall be deemed, held and considered a part of the public domain of the United States."

The Court, after a full discussion of these statutes, concludes:

"It is unnecessary to dwell longer upon this question, or to review subsequent statutes governing lands in California. It suffices to say that there is nothing in any of them which weakens the construction we have given to the Act of 1851. This controversy depends upon that act and the Pacific Railroad Acts which we have cited."

Thus it will be seen that the Court held that the

land in the grant did not pass to the railroad, because it did not become public land under the provisions of the act creating the California commission until "finally decded to be invalid." The case when carefully read and understood is a strong one in favor of the defendants in error. All the other cases from California were decided upon the same principle.

See Van Ravnegan vs. Bolton, 95 U. S., 33.

Hosmer vs. Wallace, 97 U. S., 575.

Trenouth vs. San Francisco, 100 U. S., 251.

Aurrecoechea vs. Bangs, 114 U. S., 381.

Dolan vs. Carr, 125 U. S., 618.

See also Grant vs. Jaramillo, 6 N. M., 313.

Chavez vs. Chavez, 7 N. M., 58.

In U. S. vs. McLaughlin, 127 U. S., 428, 454, 455, the Court fully reviews the case of Newhall vs. Sanger and shows that the decision rests upon the provisions of the two statutes above quoted, as I am contending. Newhall vs. Sanger is again considered in Carr vs. Quigley, 149 U. S., 652, but there is nothing in the opinion bearing on our present inquiry. It does show, however, the difference between Mexican grants and Indian reservations, and why cases based on Indian reservations are not in point.

From these cases, it unquestionably follows that a reservation from entry and location can only be the result of a statute or executive action in pursuance of a statute. The repeal of a statutory reservation, then must throw the land open to entry and location.

The question suggests itself as to what would have been the effect on these mining locations of a confirmation of the grant, with boundaries including them.

The act creating the Court of Private Land Claims provides that the mineral shall not pass with the grant, but shall be reserved to the United States, but that it shall not be worked without the consent of the grant owner until Congress provides regulations therefor. This however, is immaterial, as to the lands decided to be without the grant. Until the grant is confirmed the grant owner has no right whatever. He can not maintain ejectment or any other form of suit against occupants.

Pinkerton vs. Ledoux, 129 U. S., 346.

Botiller vs. Dominguez, 130 U. S., 238.

Astiazaran vs. Santa Rio Land and Min. Co., 148 U. S., 80.

A complete answer to this is that the locator of a mining claim makes his location at his peril before the grant is finally acted upon. If it is confirmed covering his location, he cannot perfect his title. If his location is left out of the grant as confirmed, he can. And at no time, if the grant is confirmed leaving out the location, does it lie in the mouth of a stranger to the grant title to question his right to locate under the mining laws. Under the authorities above cited the grant owner himself cannot question it before confirmation.

Pinkerton vs. Ledoux, 129 U. S., 346.

It therefore is immaterial that the record does not affirmatively show that the grant as to this mine had already been rejected by the Supreme Court of the United States. The important fact was that it had not been confirmed.

In conclusion we may ask upon what principle of law can the mere bringing of a suit for a piece of land operate ipso facto as a supersedeas? What is the difference in this respect between the suit to confirm this grant and a suit between individuals to establish title? Defendants in error claim under the United States. The presumption is that it is government land until the contrary is shown. The grant claimant must establish his claim in the mode provided by Congress, before it becomes anything else but public land.

Cases last cited supra.

While he is trying to do this, it is government land as much as any other part of the public land unless Congress has otherwise provided. In this case Congress has expressly repealed the provision which did otherwise provide.

III.

If the mining laws were applicable, the plaintiff's failure to complete a valid location by compliance with the statutes, left the land open to location by the "Washington" locators on that day.

His failure, within the three months which expired on October 10th, to mark his boundaries, do the work on the claim, and record his location notice as

required by the statute, operated as a forfeiture of any rights acquired by going on the claim and posting the location notice of the "Sampson" on July 10th.

This Court in Belk vs. Meagher, 104 U. S., 287, said:

"His ultimate right to a patent depended entirely on his keeping himself in, and all others out, and if he was not actually in, he was in law out. A peaceable adverse entry, coupled with the right to hold possession, which was thereby acquired, operated as an ouster, which broke the continuity of his holding, and deprived him of the title he might have got, if he had kept in for the requisite length of time. He had made no such location as prevented the lands from being in law vacant. Others had the right to enter for the purpose of taking them up, if it could be done peaceably and without force."

104 U. S., 287.

In the same opinion, it is said:

"The right to possession comes only from a valid location; consequently if there is no location there can be no possession under it. Location does not necessarily follow from possession, but possession from location. A location is not made from taking possession alone, but by working on the ground, recording and doing whatever else is required for that purpose by the Acts of Congress and the local laws and regulations."

See the provisions of the New Mexico statute relating to mining claims, which have already been quoted in this brief, as a part of the statement of facts. Supra, page 10.

Such local statutes as these have been uniformly held valid, as to the amount of work necessary to be

done to perfect a location, as to the manner of marking the boundaries on the ground, and as to the requirement that the location notice be recorded.

In Belk vs. Meagher, supra, it is held that where recording of the notice is required, the notice must be recorded within the prescibed time, or the ground will be subject to location by any other locator who makes a peaceable entry on it for that purpose.

Belk vs. Meagher, 104 U. S., 287.

To the same effect, see

Faxon vs. Barnard, 4 Fed. Rep., 703.

Mallett v. Uncle Sam Min. Co., 1 Nev., 188.

This Court in Kendall vs. San Juan Mining Company, expressly holds the same thing. "As they failed to comply with the law in making a record of the location certificate of their claim, it does not lie with them to insist that their wrongful entry upon the premises * * operated in their favor against parties who went upon the premises after they had become a part of the public domain, and made a proper location certificate and record thereof, and complied in other particulars with the requirements of the law."

Kendall vs. San Juan Min. Co., 144 U. S., 665.

The Courts of New Mexico have uniformly held that the plaintiff in ejectment for a mining claim must show a valid location notice, properly recorded and that the claim has been properly staked and monumented on the ground, as against a defendant, who after plaintiff's failure to do these things within the time required by law had peaceably gone on the

ground and initiated his rights under the mining law, otherwise he can not recover.

Wills vs. Blain, 6 New Mex., 238.

Seidler vs. LaFave, 5 New Mex., 44.

Baxter Mt. Min. Co. vs. Patterson, 3 New Mex., 269.

The question of forfeiture is a question of law, and if the evidence showing it was undisputed, it was the duty of the Court to take the case from the jury.

Fairbanks vs. Woodhouse, 6 Cala., 434.

The failure of the plaintiff to do any of these three things—place proper monuments on his claim, do the location work and record the notice—all of which were not done according to his own evidence, precludes his recovery in an action of ejectment. It is wholly immaterial as to what caused the failure, as we will endeavor to hereafter show.

The Supreme Court of the Territory, at the request of the plaintiff in error, made findings of fact. This was not necessary or proper in a case at law, but they are in the record and correctly state what the undisputed evidence shows as to the essential facts in the case.

(Record 279-280. Plaintiff's brief, page 15.)

IV.

The contention of the plaintiff in error that the treaty of Guadalupe Hidalgo itself operated as a reservation of this land, and the holding of the Secretary of the Interior that the repeal of the 8th section of the Act of 1854 creating the reservation, did not

have any effect on the reservation is so fully met by the opinion of the Supreme Court of New Mexico, that we might safely content ourselves by referring to it. The Secretary of the Interior had jurisliction of the matters before him when he rendered the opinion cited. It is not binding upon the courts, however. It is difficult to see how the repeal of the statute which alone authorizes and creates the reservation, can be held not to effect the reservation itself. Congress evidently did not take this view of the subject, for section 14 of the Act of 1891 provides that "if in any case it shall appear that the lands, or any part thereof, decreed to any complainant under the provisions of this act, shall have been sold or granted by the United States, to any other person, such title of the United States to such other person shall remain valid, notwithstanding such decree." And this, although the Court may hold the land grant valid, and that it includes land so sold, and we respectfully submit that such a contention is directly at variance with the principle laid down by this Court in the case of Stoddard vs. Chambers, 2 How., 285, supra. As the court below says: "The right to the possession of a mining claim is never a matter for the determination of the land department of the government. Location and possession of a mining claim is determined by the federal and local legislation, and not until the locator seeks to obtain a patent for his mining claim, does he come in contact with the land department, and even then, if his right to the possession of the claim be contested, the whole matter is referred by

the land department to the Court for determination."

Lockhart vs. Wills, 9 New Mex., 344.

The contention of the plaintiff in error, that the reservation existed by reason of the treaty is not sound. The treaty itself creates no such reservation, and none could be created, except by Act of Congress.

Boutiller vs. Dominguez, 130 U. S., 247.

Plaintiff in error in his brief, quotes numerous decisions of the land department to the same effect as the Secretary's. The Supreme Court of New Mexico is correct in its conclusion that this land was reserved for entry, as already stated. These decisions of the land department are immaterial. In a case where a similar contention was made, as to the effect of the action of the land department, holding that certain lands were reserved and did not pass under the congressional grant for that reason this Court says:

"But further, it is urged that this question of title has been determined in the land department adversely to the claim of the plaintiff. This is doubtless true, but it was determined, not upon any question of fact, but upon a construction of the law; and such matter, as we have repeatedly held, is not concluded by the decision of the land department. Johnson vs. Towsley, 13 Wall., 72; Shepley vs. Cowan, 91 U. S., 330; Quinby vs. Conlan, 104 U. S., 420; Doolan vs. Carr, 125 U. S., 618, 624; Lake Superior Ship Canal &c., vs. Cunningham, 155 U. S., 354."

Neither is the contention sound, that this case is

parallel with the location of mining claims upon lands set apart by treaty with Indian tribes for the Indians. The treaties are made, in pursuance of express statutory authority, with the Indians, and the lands expressly reserved and set apart by such agreement in accordance with statutory power vested in the executive department of the government. We, therefore, submit that the case of Kendall vs. San Juan Mining Co., 144 U. S., 663, cited by plaintiff in error, has no bearing whatever upon the propositions raised by this case.

V.

"Forfeiture" and "abandonment" are not synonymous. The first depends upon facts alone, the second upon fact and intent. In case of forfeiture, intention is immaterial.

Mallett vs. Uncle Sam G. & S. Min. Co., 1 Nev., 188.

"The term forfeiture, as used in our mining customs and codes, means the loss of a right to mine a particular piece of ground previously acquired, by neglect or failure to comply with the rules and regulations of the bar or diggings, in which the ground is situated, prescribing the acts which must be done in order to continue to keep alive that right after it has once been acquired. As a defense, it is entirely distinct and separate from abandonment. It involves no question of intent, but rests entirely upon the mining rules and regulations, and involves only the question whether in point of fact those rules and regulations have been observed by the party seeking to maintain or perpetuate the right, regardless of what his intentions may have been, whereas the principal question in the defense of abandonment is one of in-

tention."

St. John vs. Kidd, 26 Cal., 264.

4 Mor. Min. Rep., 462.

"Mining laws are to be construed by the Court, and the question whether by such laws a forfeiture has occurred, is a question of law. To submit such questions to a jury is error."

Fairbanks vs. Woodhouse, 12 Mor. Min. Rep., 86. 6 Cal. 433.

The facts as to forfeiture was absolutely undisputed. The work was not done, the claim was not staked or monumented, and the notice was not recorded as required by law.

"Forfeiture" for non-compliance with mining district rules and regulations should not be confused with forfeiture for non-compliance with United States and territorial laws; and failure to comply with these statutes works a forfeiture, whether the statute says so or not."

VI.

All evidence of alleged conspiracy and collusion between Pilkey and the "Washington', locators, Fagaly and Walker, is wholly irrelevant, because it is immaterial how or why the failure occurs which works a forfeiture.

In Saunders vs. Mackey, 5 Montana, 523, 6 Pac. Rep., 361, the defendant promised to do the annual work and failed to do it, and after such failure relocated the ground for himself, the Court says:

"Title to the public mineral land is acquired and held by discovery, location and representation in the manner provided by law. Representation from year

to year keeps alive the grant. If representation fails, the grant fails, and the ground is open to relocation and purchase. The terms of the law are absolute. There are no exceptions. If the representative work for the year is not performed, the gound located becomes again a part of the public domain. An agreement to represent is not a representation. After a period of representation has expired, an agreement to represent, not performed, cannot save a claim from forfeiture and relocation. Such an agreement would not have the effect to keep alive the grant. It would not revive a right already lost. It would not tide over a period of representation from year to year and prevent a relocation of the ground. It is not material for what reason there has been a failure to perfom such an agreement. The conclusive fact is that the gound has not been represented. Congress alone has the authority to dispose of the public lands. If an agreement between individuals could prevent a relocation of the public mineral lands, then the primary disposal of the soil may be taken from Congress and confided to the contracts of private parties. The fact that these parties were tenants in common does not affect the question of representation. Mining claims so owned must be represented as if owned by one person."

5 Montana, 523.

In Doherty v. Morris, 11 Colo. 12, the ~~plaintiff claimed~~ defendant promised to do the work on the mine, but failed to do it, entered into a conspiracy with the other defendants to let the claim be forfeited and relocated it for failure to do the work. It is a much stronger case of conspiracy than it can possibly be claimed the rejected evidence in this case tends to show. The evidence here shows that the plaintiff himself could have recorded the location notice and failed to do so, and the claim would have been forfeited whether there

was any conspiracy or not. The court said:

"Under the allegations of the amended complaint, an effort was made upon the part of the plaintiff to show that there was a conspiracy between Doherty and Bryan to make default on the assessment work, with a view to the relocation of the lode by Doherty. However this may have been, and whatever the complainant's equities in view of it, the fact remained that the annual work was not done, and this was conclusive against the plaintiff's right to recover in the suit in support of his adverse claim. In this connection, the court erred in telling the jury, in its fifth instruction, that if they believed from the evidence that Doherty and Bryan conspired together to relocate the claim in order to shut out the interest of the plaintiff, the plaintiff was entitled to recover."

To the effect that a co-tenant can relocate an abandoned or forfeited claim to the exclusion of his co-tenants, also see

Neither is there any rule of law which makes a subsequent relocation of a mining claim by a co-owner enure to another co-owner's benefit. A co-owner can relocate and exclude his other co-owners.

Strong v. Ryan, 46 Cal., 33

It is said in Sauders v. Mackey, 5 Montana, 523, supra, "If the respondent," who was a co-owner, and promised to do the work, called representative work in Montana, and failed to do it, and relocated the claim in his own name, "has violated his contract, he is liable in damages for a breach thereof, and if the relations between him and Julia D. Saunders were such as to make him her trustee, in the location of the

Baltimore claim, a proper action would so declare him, and protect her interest therein, but there is nothing in the complaint to invalidate the Baltimore location and claim."

This exact doctrine is announced by Judge Sawyer in Hunt v. Patchin, 35 Federal Rep., 816. These principles when applied, clearly show that plaintiff could not recover in this action of ejectment, and that all the evidence of conspiracy and combination between the locators of the "Washington" and plaintiff's co-owner, was immaterial. We do not want to be understood as admitting that this evidence, however, would under any circumstances have made out a case entitling the plaintiff to relief, either in equity or at law.

VII.

This is not a suit brought under section 2326 of the Revised Statutes of the U. S. It is a plain statutory ejectment under the ejectment statute of the Territory. The plaintiff must recover on the strength of his own title, not on the weakness of his adversaries. At the time this suit was tried, there was no commingling of equitable and legal remedies, nor is there yet as to the action of ejectment.

Sec. 3160, Compiled Laws of N. M., "The action of ejectment may be maintained in all cases where the plaintiff is legally entitled to the possession of the premises.

Sec. 3164, Compiled Laws of N. M., "It shall be sufficient for the plaintiff to declare in his petition that on some day, in such petition named, he was entitled to the possession of the premises, describing them; and that the defendant, on a day named in the petition, afterwards entered into such premises, and

unlawfully withheld from the plaintiff the possession thereof, to his damage ,for any sum he may name."

Sec. 3165, Compiled Laws of N. M., "The defendant may plead, Not guilty, and under such plea give in evidence any testimony showing that the plaintiff is not entitled to such possession, or that the title is in some other person?"

Sec. 3166, Compiled Laws of N. M., "To entitle the plaintiff to recover in an action of ejectment, it shall not be necessary for the plaintiff to prove that at the time of the commencement of the action the defendant was in possesion of the premises claimed, but the fact of such possession shall be taken as admitted by the defendant upon his filing a plea of not guilty."

Sec. 3168, Compiled Laws of N. M., "It shall be sufficient to entitle the plaintiff to recover, to show that at the time of the commencement of the action the defendant was in possession of the premises claimed, and that the plaintiff had a right to the possession thereof."

These are the material parts of the New Mexico statute on ejectment.

"In the ordinary action of ejectment a defendant may rely upon the weakness of plaintiff's title, but in the proceeding contemplated by the Revised Statutes, in the light of the amendment of March 3, 1881, both parties are regarded as actors, and some of the rules pertaining to ordinary actions are necessarily modified in the trial of such cases." Lindley on Mones, Sec. 763.

Plaintiff would have to show facts entitling him to hold as against the United States in such a case. The rules applied in such cases do not therefore apply in this.

Gwillim v. Donnellan, 115 U. S., 45

Neither does the principle invoked by plaintiff in

error on page 28 of his brief apply here, namely, that where the legal title is outstanding in a third person, in this case the United States, "the courts regard the better right as between the parties to be vested in the first possessor." A valid mining location, although unpatented, is equivalent to a legal title, and is so expressly recognized by the New Mexico statute, and all the decided cases.

In 1865, Section 910 of the Revised Statutes of the U. S. was enacted, providing that "no possessory action in any court of the United States, for the recovery of any mining title, or for damages to any such title, shall be affected by the fact that the paramount title to the land in which such mines lie is in the United States; but each case shall be adjudged by the law of possession."

1 Lindley on Mines, Sec. 538.
Rev. Stat. of U. S., Sec. 910.

Section 3161 of the Compiled Laws of New Mexico, supra applies the same principles by making unpatented mining claims real etstate for the purposes of an action of ejectment.

"A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold and conveyed and will pass by descent. It has the effect of a grant by the United States of the right of present and exclusive possession of the lands located. Actual possession is not more necessary for the protection of the title acquired to such a claim by a valid location, than it is for any other grant."

1 Lindley on Mines, Sec. 539, citing
Noyes v. Mouth, 127 U. S., 348;

Belk v. Meagher, 104 U. S., 279;

Gwillim v. Donnellan, 115 U. S., 45.

"Yet as between the locator and everyone else, save the paramount proprietor, the estate acquired by a perfected mining location possesses all the attributes of a title in fee, and so long as the requirements of the law with reference to continued development are satisfied the character of the tenure remains that of a fee."

Lindley on Mines, Sec. 539.

V.

If our contention is right, as to this ground being subject to location under the mining laws, the case stands in an action of an ejectment, as if the defendants had a perfect legal title, and the plaintiff by his own testimony admitted that he had no title.

VIII.

The plaintiff in error's statement of the law, in cases where neither party has any title, and their rights are to be determined on the law of naked possession, is singularly inaccurate. The prior possession unless continued, adverse and uninterrupted, until intruded upon by the defendant, does not make out a *prima facie* case for the plaintiff.

This Court has announced in suits for the recovery of mining claims, the rule we contend for, and not that which plaintiff in error contends for, namely:

"In such cases the rule which applies to actions of ejectment, and to all actions to recover possession of real estate applies, namely, that the plaintiff can only recover on the strength of his own title, and not on the weakness of defendant's title.

"Whether the defendant has title or is a mere trespasser, it is crtain that he is in possession, and that is a sufficient defense against one who has no title at all, and never had any."

Reynolds v. Iron Silver Min. Co., 116 U. S., 687-698.

Under the New Mexico statute above quoted, the defendant must show that he had a right to the possession at the time suit was brought. It is not sufficient for him to show that at some prior time he had been in possession.

"If there is any exception to the rule that in an action to recover possession of land the plaintiff must recover on the strength of his own title, and that the defendant in possession can lawfully say until you show some title, you have no right to disturb me, it has not been pointed out to us."

Reynolds v. Mining Co., 116 U. S., 692.

IX.

The principle invoked by the plaintiff in error that neither party having title, the plaintiff having shown actual possession is entitled to recover, is applicable only when the plaintiff shows actual possession at the time of the intrusion. The Supreme Court of New Mexico, in the cases cited by the plaintiff in error, so applies the rule.

New Mexico, etc., Ry. Co. v. Crouch, 4 N. M. 293.

Deemer v. Falkner, Id. 149.

Bell v. Skillicorn, 6 N. M., 402.

This court so states the law. "In actions of eject-

ment, or trespass quare clausam fregit, possession by the plaintiff at the time of eviction has always been held prima facie evidence of the legal title, and as against a mere trespasser it is sufficient. 2 Greenl. Evid. Section 311."

Campbell v. Rankin, 99 U. S., 262.

This Court has so clearly and distinctly annunciated the principle applicable to this case and the reasons upon which it rests, that we content ourselves with quoting from its decision, in Sabariego vs. Maverick, 124 U. S., 297, as follows:

"The evidence must show a continuous possession, or at least that it was not abandoned, to entitle a plaintiff to recover merely by virtue of such possession.' That is to say, the defendant's possession is in the first instance presumed to be rightful. To overcome that presumption the plaintiff, showing no better right by a title regularly deduced, is bound to prove that, being himself in prior possession, he was deprived of it by a wrongful intrusion by the defendant, whose possession, therefore, originated in a trespass.

"This implies that the prior possession relied on by the plaintiff must have continued until it was lost through the wrongful act of the defendant in dispossessing him. If the plaintiff cannot show an actual possession, and a wrongful dispossession by the defendant, but claims a constructive possession, he must still show the facts amounting to such constructive *possession*. If the lands, when entered upon by the *defendant*, were apparently vacant and acctually *unoccupied*, and the plaintiff merely proves an antecedent possession, at some prior time, he must go further and show that his *actual possession* was not abandoned; otherwise he cannot be said to have had even a constructive possession."

Sabariego v. Maverick, 124 U. S., 297-8.

It was upon this principle, as enunciated in this case, that the trial court instructed the jury to find for the defendants. The plaintiff had not shown that he had not abandoned the naked possession held by him, but on the contrary by his own evidence clearly showed that his possession had not been continuously maintained up to the time that the Washington locators entered. If the case had been submitted to the jury, on the theory that neither party had title under the mining laws, and a verdict had been rendered in favor of the plaintiff, the Court would have been compelled to set it aside. In such a case, under the decisions of this Court, it is the duty of the Court to take the case from the jury.

X.

There was no relation of co-tenancy between Pilkey and the locators of the Washington under any view that can be taken of the case. If Pilkey surrendered the possession of the claim to the locators of the Washington, and they made a hostile location of it, that possession was adverse to the plaintiff. If they had agreed to let Pilkey have an interest in the Washington location, it was an open repudiation of any co-tenancy. In fact Pilkey repudiated it to both plaintiff and Ben Johnson about October 5th. (Record 145-6-7.) A relocation of a mining claim can not be treated as the acquirement of an outstanding title. The Sampson location was at an end, or no valid location of the Washington could be made. Whenever the old location ends,

the relation of co-tenancy ceases. The moment that the ground becomes subject to relocation for forfeiture, the relation of co-tenancy created by the forfeited location must end. This Court has clearly held that where an outstanding title is acquired by one partner in a mining claim, such purchase does not enure to the benefit of his co-partners.

Bissell vs. Foss, 114 U. S., 260.

The statute contains this provision: "And upon a failure to comply with these conditions the claim or mine upon which such failure occurred shall be open to relocation, in the same manner as if no location had ever been made." Revised Statutes of U. S., Sec. 2324. See also,

Strang vs. Ryan, 46 Cal., 33.
Dougherty vs. Morris, 11 Colo., 12.
Sanders vs. Mackey, 5 Montana, 523.
Hunt vs. Paldino, 33 Fed. Rep., 816.

There can be no question that the possession of a co-tenant in a mining claim can become hostile to his co-tenants, whenever he openly repudiates the relation, and gives notice to his co-tenants of such repudiation, notifies them that he is no longer holding for them, and this Pilkey did.

Freeman on Co-tenancy and Partition, Sec. 229.

The bringing of this suit admits that there was an ouster, otherwise ejectment could not be maintained.

Barnitz's Lessee vs. Casey, 7 Cranch, 471.

The evidence clearly shows that neither Pilkey or any other person had such prior possession as would sustain an action of ejectment.

Sabriego vs. Maverick, 124 U. S., 297, quoted supra.

There is no ground for the contention that Pilkey's possession was or could have been the plaintiff's after the repudiation of the contract, which all the evidence shows was before the entry of defendants. A prospecting contract can be rescinded or abandoned, and thereafter, all privity under it ceases.

Chadbourne vs. Davis, 9 Colo., 581.

In the action of ejectment under the New Mexico statute the plaintiff cannot recover on an equitable title, but only on the legal title, or actual prior possession of which he has been deprived by a defendant without title.

All evidence of fraud was therefore immaterial. The New Mexico statute of ejectment was enacted in 1847, and was re-enacted in the subsequent revisions of the laws of the Territory. Compiled Laws of N. M. (1865) 228; Compiled Laws of (1897) 3160, 3162, 3163 to 3168. It was taken, like all the early statutes enacted in New Mexico, from the statutes of Missouri. See statutes of Missouri (1845), page 232, Secs. 4 to 10 inclusive. These are the identical sections of the revised statutes of New Mexico above cited.

See page 41, supra.

These provisions have ever since been retained in Missouri. Revised Statutes of Missouri (1879), Sec.

2243, et seq. Lertensdorfer vs. Webb., 20 How., 176.

The Supreme Court of Missouri has uniformly held under this statute that no recovery could be had on an equitable title, and that the rules of the common law were not changed by the statute.

Hunter vs. Hempbill, 6 Mo., 106.

Guerno vs. Jones, 6 Mo., 330.

"If there were any circumstances of fraud in the person obtaining the confirmation in his own name, which would affect him with a trust in favor of those interested in the title, the circumstances must be stated as a ground of relief, so that the title, which the government has passed to him, may be decreed to pass to those interested. The present action is simply an action of ejectment, founded upon the plaintiff's title." The Court sustains a demurrer to the petition upon the ground that recovery in ejectment could not be had except upon the legal title.

Guyol vs. Chouteau, 19 Mo., 546.

In another case that Court held that in an action of ejectment relief upon the ground of mistake could not be had, and possession be recovered.

Williams vs. Carpenter, 35 Mo., 70.

"The defendant then held the premises under a legal title with actual possession; and before a plaintiff can recover in ejectment, he must show both a legal interest and a possessory title. R. C. 1855; 2 Greenleaf Ev., Sec. 303; Adams on Ejectment, 33."

Beal vs. Harmon, 38 Mo., 439. See also

Pickett vs. Jones, 63 Mo., 200.

"While it is true that legal and equitable rights can, in many states, be adjudicated in the same forum and in one action, it by no means results that the distinction in pleading and in the nature of the relief af-

forded have been abrogated."

Sedgwick and Wait on Trial of Title to Land, Sec. 184.

In the case at bar no equitable relief was asked, no issue of fraud is raised. The only right asserted was the legal right to the possession. This would of itself preclude the admissibility of any evidence of fraud, and any recovery on that ground. If plaintiff had been ousted of the possession, if defendants had wrongfully intruded upon his possession, how could evidence of a previous agreement or combination to do so, add anything to the fact that he had been so ousted, and deprived of the possession?

"A party who has a right of entry upon lands, and who has entered by force or fraud, can not be turned out of possession by the action of ejectment. If he possesses the right of entry, it is not impaired by any fraud, false representation or collusion practiced by him upon one having no right of possession, and so, if he is rightfully in possession he will not be put out of possession, though he may have gained an entry by any species of collusion. The wrongful entry and the wrongful withholding of the premises is, in ejectment nothing more than the entry upon the possession of the plaintiff, and the withholding the possession from him, without lawful right so to do. They are not made, in a legal sense, any more wrongful, in an action of ejectment, by superadding to them fraud or collusion. If the defendant has no right to the possession, as against the plaintiff, the plaintiff's cause of action is not, in the least degree, strengthened by proof of the fraudulent acts of the defendant in acquiring the possession. He may safely rest upon proof of his legal title to the possession, and the fraud or collusion of the defendant is immaterial."

Depuy vs. Williams, 26 Cal., 314.

This decision was rendered in ejectment for a mining claim, and the defense was that the plaintiffs had abandoned it by failure to work it according to the mining laws. The plaintiffs attempted to show defendants got possession of the mining claim by collusion with one of the co-owners. The plaintiffs were nonsuited.

This Court has repeatedly held that ejectment can only be sustained on the legal title or its equivalent "In actions of ejectment in the United States Courts, the strict legal title prevails. If there are equities which show the right in another, these cases can only be considered on the equity side of the Federal Courts."

> Foster vs. Mora, 98 U. S., 428. To the same effect, see
> Johnson vs. Christian, 128 U. S., 382, citing
> Bagnale vs. Broderick, 13 Peters, 436-450.
> Hooper vs. Scheiner, 23 How., 235.
> Foster vs. Mora, 98 U. S., 425.
> Langston vs. Sherwood, 124 U. S., 74-85.
> Moorehouse vs. Phelps, 21 How., 294.

"But in the action of ejectment, in the Federal Courts, the legal title must control, and to another forum the plaintiff must look for the enforcement of any equitable rights he may possess."

> Oaksmith's Lessee vs. Johnson, 92 U. S., 346. See also,
> Carpenter vs. Montgomery, 13 Wall., 480.

If the land was subject to mining location, there can be no question that the evidence was inadmissible. A valid mining location is property in the highest sense of the word. It is equivalent to a grant.

Belk vs. Meagher, 104 U. S., 279.
Forbes vs. Gracy, 94 U. S., 762.
Gwillim vs. Donnellan, 115 U. S., 45.

XI.

Conceding that the mining laws did not apply, nevertheless, the trial court was justified in instructing the jury to find for the defendants.

The evidence shows clearly an abandonment of the possession, slight as it was, which Pilkey took in July. It shows that Pilkey notified plaintiff that it was abandoned, and plaintiff himself participated in the abandonment by failing to file his location notice for record when he thought the claim to be on unclaimed public land. A mining claim and location have thus been defined: "A mining claim is a parcel of land containing precious metal in its soil or rock. A location is the act of appropriating such parcel according to certain established rules. It usually consists in placing upon the ground in a conspicuous position a notice setting forth the name of the locator, the fact that it is thus taken or located, with the requisite description of the extent and boundaries of the parcel according to the local customs, or since the statute of 1872 according to the provisions of that act."

Smelting Co. vs. Kemp, 104 U. S., 636, 649.

Under the evidence in this case, the parties were endeavoring to make a location of a mining claim by compliance with the requirements of the statute, knowing full well what those requirements were,

and deliberately failed to comply with them. The trial Court, therefore, correctly held that the evidence that one of the locators had colluded with the subsequent locators to affect the abandonment of the location was immaterial when by the admissions of both of his co-locators they knew the necessary steps to perfect it had not been taken, and were themselves parties to the failure to take some of them. The Court further correctly proceeded upon the theory that an abandonment may be so clearly shown by the evidence that it would be error to submit the question to the jury. We therefore, insist that the Court was right under either the theory of abandonment or forfeiture.

Failure to do the work, properly monument the claim, or file the notice of location, under such circumstances—believing that the mining laws applied and knowing what they required, even if these laws did not apply, would amount to abandonment.

Ferris vs. Coover, 10 Cal., 631.
St. John vs. Kidd, 26 Cal., 272.
Davis vs. Butler, (6 Cal.) 1 Morrison Min. Rep., 7.
Derry vs. Rosse, (5 Col.) 1 Mor. Min. Rep., 5.
Mallett vs. U. S. Co., Id. 29.
Depuy vs. Williams, 5 Mor. Min. Rep., 251.
Strang vs. Ryan, (4 Cal., 33) 1 Mor. Min. Rep., 48.

The right of a discoverer of mineral on public lands is that of one in lawful possession merely until he has

perfected the location, and when a party fails to perfect his location, abandonment takes place under common law principles independent of any mining rule or regulation, and the ground becomes once more public domain and open to the occupation of the next comer.

St. John vs. Kidd., 26 Cal., 272.

"Inference of abandonment may arise from a single act as well as from a series of acts continued through a long space of time. It is a fact to be determined from the particular circumstances of the case."

Davis vs. Butler, 1 Mor. Min. Rep., 7.

Derry vs. Ross, (5 Colo.) 295. 1 Mor. Min. Rep., 5.

Mallett vs. U. S. Co., Id. 29.

Prior discovery and possession is not sufficient title to sustain ejectment where the discoverer fails to comply with the law and perfect his location, and the land becomes subject to re-location.

Defendants in error submit that the relationship which existed between Pilkey, Ben Johnson and plaintiff in error was that of "co-tenants" and not partners. The trust relationship between partners does not exist between co-tenants in mining claims.

Tuck vs. Downing, 76 Ill.) 71. 7 Mor. Min. Rep., 83.

Bissell vs. Foss, 114 U. S., 252.

There is no evidence in this case upon which to base any such proposition as set forth in plaintiff in error's brief that the putting of Fagaly in possession and denial by Pilkey of plaintiff's rights between the

expiration of the three months after the first location, and the location of the Washington, constituted an actual ouster of plaintiff. The evidence shows that said claim was re-located on the 23rd day of October, 1893, thirteen days after the expiration of the 90 days from the date of the location of said Sampson mine, and Fagaly's presence in the neighborhood of the claim, or even upon the claim for the purpose of making a location after the expiration of the three months would be wholly immaterial.

The allegations of fraud and collusion between Pilkey and the locators of the Washington mine, add nothing to plaintiff in error's right to maintain his ejectment suit, and was not a question which should have been submitted to the jury, or that could have been litigated in an ejectment suit.

Morehouse vs. Phelps, 21 How., 294.
Oaksmith vs. Johnson, 92 U. S., 343.
Carpenter vs. Montgomery, 13 Wall., 480.

Abandonment may be shown under the general issue. "The instant an abandonment takes place, a vacancy in the possession occurs. The right of possession of the former occupant is absolutely lost, and the land becomes public juris and free to the occupation of the next comer. * * * It does not appear that the boundaries of the claim were designated by any visible monuments or marks upon the ground, other than the treee upon which the notice was posted. It is evident that an actual possession of the entire three thousand feet described in the complaint can not be successfully claimed by virtue of the location, nor does it appear from the findings that the plaintiff had that constructive possession

which arises from a location made in accordance with the customs or regulations of miners."

Morenhaut vs. Wilson, 52 Cal., 263.

"We have held that an abandonment of mining claims by a plaintiff may be shown by the defendant under the general issue. Willson vs. Cleveland, 30 Cal., 200."

The case at bar is a much plainer case of abandonment, because no monuments were put up, no work done, no notice recorded. In accordance with the view of this Court, the failure to mark the boundaries, the plaintiff never had any actual possession, upon which defendants intruded—neither did he have constructive possession under compliance with the mining laws. The burden of proving either one or the other was upon the plaintiff.

Sabriego vs. Maverick, Supra.

The excluded evidence would not have helped his case in these particulars. The trial Court was therefore right in peremptorily instructing the jury. The first opinion rendered in the Territorial Supreme Court, (Record 267) 9 New Mex. Rep., 263, proceeds upon the theory that abandonment being a question of intention, must always be left to the jury. This is itself unsound. The evidence may be so clear the circumstances so convincing, that a mere declaration of the absence of an intention to abandon would not be sufficient to sustain a verdict of a jury, and the Court would be compelled to set aside the verdict. It would amount to no more than a scintilla of evidence.. In such a case the Court should not submit the case to a jury.

Randall vs. Baltimore & Ohio Ry. Co., 109 U. S., 482.

Goodlet vs. L. & N. Ry. Co., 122 U. S., 391.

"It would be an idle proceeding," this Court said in North Penn. Railroad vs. Commercial Bank, 123 U. S., 733, "to submit the evidence to the jury when they could just find only in one way."

Delaware & C. Ry. Co. vs. Converse, 139 U. S., 469, and also the cases cited there.

The statement of thecase in 52 Cal. is the correct one. It was incumbent upon the plaintiff to prove affirmatively that his actual, visible possession of the property, by such acts as are usually done for the purpose of perfecting and holding a mining claim up to the time his possession was disturbed, and not having shown this he was not entitled to recover.

Sabriego vs. Maverick, 124 U. S., 261.

XII.

The excluded evidence was also inadmissible for other reasons. The testimony of Neeland is as to a conversation with Fagaly in September, which does not amount to anything. (Record, page 126.) The other conversations were after October 23rd, when a car load of ore had been shipped. The cross examination shows that in the first conversation no conspiracy was mentioned. The second was about the latter part of September. The third, five or six weeks after the second. The conversaton with Walker long after the mine was located and the rights of the parties fixed. (Record, 129, 130, 131.)

Mrs. Metz offered to testify to statements made in

the latter part of June or first of July, 1893, to the effect that Pilkey said he had located the Sampson and Columbus for plaintiff and Ben Johnson. This was before the Sampson had been located. She offers to testify to conversations in September and October, but what she said was rather in the nature of conclusions than the statements of the parties. (Record 132, 135, 136.) They are in themselves immaterial. The Court permited her to testify that Pilkey said, between the 10th of July and 10th of October, that he was in possession for plaintiff. She could not fix the dates of any of the conversations, and stated that they were between June and July. (Record 139.)

H. B. Fergusson offered to testify, as stated on pages 6, 7 and 8 of plaintiff's brief. (Record, pages 111 and 112.) He also testified with reference to these conversations, as follows:

"Q. Can you fix the date of these conversations approximately?

A. Yes, sir; I think I can. The suit I believe, was filed—

The Court: What suit?

A. The first suit we brought for Lockhart after he employed us to contend for the Sampson location; in May, 1894, I think.

The Court: The papers in the case will show. You can state when with reference to that date, when it was.

A. These conversations began with reference to these disclosures he made in regard to the Washington claim—

Counsel for Plaintiff: It is a fact as shown by the bill that the first equity suit was filed May 26th, 1894.

A. The first conversations occurred subsequent to the filing of that suit and they extended substantially

up to the time of his death in various conversations. He told me once, after he had made most of the disclosures, that I could buy a fifth interest; that was on the street at Frank Sturgess' corner; I was passing there and he stopped me and said if I wanted to he could get me a fifth interest in the Washington location for $1,000.00.

Counsel for Defendant: Whose fifth interest?

A. I asked him that question, whose fifth interest it would be; he said Pilkey's; that Pilkey was in debt and was bound to sell out—"

Witness states that these conversations were prior to the time Fagaly conveyed his interest to the defendant Dunlap, and after May, 1894. (Record 115.) On cross examination the witness testified that the law firm of which he was a member were the attorneys for Frank Fagaly; that Wills, one of the original defendants in this suit, had brought a suit against Fagaly, claiming one-twentieth of Fagaly's fifth interest in the Washington claim—this suit was then pending; that the plaintiff wanted to employ the firm to bring this suit; that before the witness agreed to accept the employment, and bring the suit, the plaintiff executed a deed, conveying one fifth interest in the Sampson location and placed it in escrow with the witness to be delivered to Fagaly, when this litigation against Wills and his co-defendants in this case was finally concluded in favor of the plaintiff. All of these conversations were after the suits were filed. The first suit brought by plaintiff was a chancery suit to recover the same property involved in the present action, and the conversations were after that suit was filed. The Wills suit is in the Record, page 73. The deed was dated March 30, and ac-

knowledged May 25, 1894, and delivered the day before plaintiff's chancery suit was filed. The deed was to be delivered when the litigation was finally and successfully concluded. (Record 115, 116 and 117.) In answer to a question as to the delivery of the deed, witness testified as follows:

"The Court: You mean successfully concluded?

A. Yes, sir; otherwise there would be no use to deliver it.

Q. If not successfully concluded, not otherwise to be delivered?

A. It would not be worth much if not successfully concluded. In the second place Mr. Lockhart told me he was willing for me to deliver it, I might deliver it, provided Fagaly had in the litigation told all that he had some reason to believe were the inside facts as to the manner the arrangement was alleged.

Q. In other words, if Fagaly testified the way you and Mr. Lockhart thought the facts to be you might deliver the deed; otherwise not?

A. There was no talk between Lockhart and me as to what we expected Fagaly would tell, except in a general way Mr. Lockhart expressed a conviction that he had been swindled and robbed and believed if Fagaly would open up we would win the suit.

Q. The understanding was when you were talking to Fagaly you were Fagaly's attorney; Fagaly so understood?

A. We were as a matter of fact, and I guess he understood it, and I did too—Fagaly's attorney in the litigation as to the twentieth ownership under the Washington location, the twentieth interest.

Q. Did Fagaly ever authorize you to testify as to the statements he made to you under any circumstances?

A. No, sir; Mr. Fagaly died suddenly, unexpectedly to me, and up to the time I heard he was

dead I had no doubt he would take the stand and tell this himself, so I could not anticipate telling it.

Q. It was never expected you would testify to it, but you expected Fagaly would testify to it if he had lived?

A. Yes, sir.

Q. Then I would like to ask you, did Fagaly come to you before his death in company with Samuel Dunlap and demand that deed?

A. Yes, sir—no he didn't come and demand the delivery of the deed; that is, Fagaly came in company with Dunlap and stated to me he had sold his interest in the Washington and Sampson to Mr. Dunlap, that he had made him a deed to his interest in the Washington and that he wanted the deed which I held to be delivered to him in the future, delivered, when it was delivered, to Mr. Dunlap; that was the request.

Q. Was there any contemplation or understanding as to what should be done with that deed in case Fagaly died?

A. No, sir.

Q. Why is not that deed subject to delivery after Fagaly's death as you understand the matter, to Dunlap?

Counsel for plaintiff objects to question as calling for the legal opinion or conclusion of the witness which the Court would have to draw.

Counsel for defendant: I ask the question in order to base my argument to the Court.

A. Well, in the first place the deed was to be delivered when this litigation was successfully terminated in behalf of Lockhart; in the second place it was to be delivered in case Fagaly took the stand and testified in person to what he told me were the facts. He never did take the stand and testify, and I presume that is a sufficient answer to the question; and when he died I will state—(interrupted by next question by the court.)

The Court: Let me ask you this: As I under-

stand you, Mr. Lockhart delivered you this deed to be delivered to Fagaly, not if he stated the facts on the stand he had related to you, but if he opened up the matter?

A. Yes, sir.

The Court: Because no revelations had been made by Fagaly to you at the time Lockhart gave you that deed?

A. No, sir; nor for several weeks afterwards.

Q. You hadn't talked to Fagaly when Lockhart gave you this deed?

A. No, sir; Fagaly didn't know I had this deed for some weeks afterwards.

Q. Did you tell him you had the deed when you had your talk with him when he told you these facts?

A. Yes, sir; I told him I had the deed soon after the suit was brought, because he came and asked me about bringing the suit against him in the Sampson-Washington case, the present suit.

Q. He understood you were about to bring a suit against him on that account?

A. He understood we had brought it because the subpoena had been served on him.

Q. And then you told him you had that deed?

A. Yes, sir; that I hadn't brought it until I could protect him.

Q. You told him you would deliver the deed if he told the facts?

A. I believe he had already said he expected to open up and tell all; that was simply an afterthought that I let him know the deed was there and know he was in an impartial position.

Q. Look at that affidavit; is that your affidavit?

A. Yes, sir.

Q. Does not that state that the deed was placed in your hands of affiant, in escrow, to be delivered by you to Fagaly upon and on the promise of the performance of certain conditions by said Fagaly; now what conditions?

A. Is the word promise there?

Q. Yes, sir.

A. It ought not to be if it is—(witness looks at said affidavit). Well, that ought not to be in there if it reads that way. This is all I have to say about that. It is a fact that in my own mind I determined not to tell Mr. Fagaly and to do no more towards inducing him to testify than to show him that he was in an impartial position by showing him the deed, and I never did tell him that the deed was to be delivered on his testifying to anything.

Q. You say then when you made that affidavit you made a mistake in putting that pord promise there?

A. It is a mistake.

Q. Then you should no have put that word "promise" there?

A. It is a mistake; if it implies that I had told Fagaly before he made these disclosures to me he was to do so before he got his deed, then it is clearly and unequivocally a mistake.

Q. You got, Mr. Fergusson, a deed to a fifth interest of the two extensions, North and South extensions of the Washington?

(No answer to this question, the Court interposing a question to witness about the same time and diverting the attention of the witness to his question.)

The Court: What conditions, if at all, Fagaly was to perform?

A. There was no condition named to him he was to perform.

Judge Warren (counsel for plaintiff): Except in regard to the conclusion of the litigation?

A. The litigation was expected to be concluded—yes, he was told this deed was to be delivered to him when the litigation was over, nothing more.

Q. Didn't you get a deed from Fagaly to his fifth interest in the North Star and Sunny South as your fee for representing him in this litigation?

Objection by counsel for plaintiff, but witness an-

swers at same time.

A. No, sir; I will state in connection with that that Mr. Fagaly had a money consideration to pay in his Wills matter, and after paying a part of it, I think there was a balance of $100.00—either $50.00 or $100.00 due for the fee in the litigation between Wills and Fagaly about the 20th interest, and that I bought the fifth interest first personally, from Fagaly for the balance of this fee and I think $100.00 which I paid him in cash. Subsequently, at Judge Warren's suggestion, I deeded him half of what I had obtained from Fagaly in the North Star and Sunny South—the north and south extensions of the Washington."

(Record, pages 118, 119 and 120.)

The declarations of Fagaly and Walker are offered upon the theory that there was a conspiracy between them and Pilkey to defraud the plaintiff and Ben Johnson out of the Sampson claim. There was no foundation for the admissibility of these declarations, by proof of the conspiracy aliunde. Most of them were said to have been made long after the conspiracy, if any, had ended. The Washington had been located and some of the claimants were fighting among themselves over it. None of the declarations appear to have been made in furtherance of the conspiracy. The rule is thus stated:

"But here, as in other previous modifications of the rule before us, we must keep in mind the underlying distinction between admissions in furtherance of a conspiracy and admissions after its close. An admission of a co-conspirator, in any way coincident with and explanatory of a conspiracy, so far as concerns the subject matter of the declaration, is determined, is inadmissible. Thus, where the defendant was charged with conspiracy with T., and others to de-

fraud the revenue, it was shown by the prosecution that the defendant was a landing waiter, and T. an agent for importers at the custom house; it being their duty each to make entries of the contents of cases imported, so as to check the other. On thirteen occasions they made false entries, entering packages at less than their real bulk. T's check book was offered by the prosecution, for the purpose of showing by the counter foil that the defendant received from him part of the money of which the government had been defrauded by their operations; but this was rejected by the Court, on the ground that the statement was made after the plot was consummated, and related only to the distributing of plunder. Of course it was understood that, to entitle the declarations of the co-conspirator to admission the conspiracy must be first proved aliunde."

2 Wharton on Evidence, Section 1206.

There never was any proof of any conspiracy aliunde the declarations of the alleged conspirators offered in evidence by plaintiff in error.

"To make such admissions or declarations competent evidence, it must stand as a fact in the cause, admitted or proved that the assignor and assignees (the conspirators) were in a conspiracy to defraud the creditors. If that fact exist, then the acts and declarations of either, made in execution of the common purpose, and in aid of its fulfillment, are competent against either of them. The principle of its admissibility assumes that fact.

"It necessarily follows that those declarations or admissions cannot be received to prove the fact itself. This is quite plain. A species or form of evidence which is in its nature inadmissible, unless some prior or other fact is proved, cannot be received to establish the fact, proof of which is an indispensable condition of its own admissibility."

Cuyler vs. McCartney, 40 N. Y., 228.

The admissions of part owners or tenants in common are not admissible against each other.

2nd Wharton's Ev. sec. 1199; note 3, citing Dun vs. Brown, 4 Cowen, 483, where the point is expressly decided and the authorities reviewed.

The question of admission in disparagement of title is fully treated in 2nd Wharton on Evidence, secs. 1156 to 1170, and from which we deduce, first, such declarations must have been made when the declarant was in possession; second, such declarations must not conflict with record title; third, they must have been made before declarant parted with his title; fourth, they must be self-disserving or knowingly against interest.

XIII.

The evidence of the witness Ferguson was clearly inadmissible on the ground that it was a communication between attorney and client.

The witness knew that he could not accept conflicting employment. He had already accepted employment from Fagaly, to protect his interest in the Washington to the extent of one-twentieth of the claim, as against Wills. This suit of Wills was based solely on the Washington location. To protect his client Fagaly against the suit which he brought for the plaintiff, he took the deed from plaintiff to Fagaly. Under these circumstances the communications from Fagaly were made to the witness. Fagaly conveys his interest in the Washington to Dunlap, who is a defendant in this action. Fagaly died without consenting to have the witness testify to his declar-

ation, even if he could consent after having conveyed the interest to be thereby affected to Dunlap. The statement of the proposition would seem sufficient without the citation of authority. "An attorney may not represent adverse interests or undertake the discharge of inconsistent duties; after having been retained by one party he cannot without a plain violation of his professional duty attempt to represent any party or interests which are opposed to his client, or receive any compensation from either party."

3 Am. & Eng. Enc. of Law, 295.

He was charged with the protection of Fagaly's interest, and was his attorney of record when the declarations were made to him—first, to defeat Wills; second, to see that Fagaly was protected against Lockhart's suit. He was also Lockhart's attorney. The fact that he held the deed, did not modify the situation, it rather aggravated it. Fagaly might for many reasons, which suggest themselves, have concluded not to testify to what witness and Lockhart might have thought entitled him to the deed. Even if he did, he was not to receive the deed unless the litigation terminated in Lockhart's favor.

"All communications made by a client to his counsel for the purpose of obtaining professional advice or assistance are privileged."

"The general rule is not disputed that confidential communications between client and attorney, are not to be revealed at any time. The privilege indeed is not that of the attorney, but of the client, and it is indispensable for the purpose of private justice whenever facts, therefore, are communicated by a client to counsel, solely on account of that relation, such counsel are not at liberty, even if they wish to dis-

close, and the law holds their testimony incompetent."

Chirac vs. Reinecker, 11 Wheaton, 294.

They need not relate to litigation.

Bacon vs. Frisbie, 80 N. Y., 394.

In this case, the Court say:

"This is in the nature of that which excludes evidence, when the production of it would be prejudicial to the public interests. The public good in the concealment of it overbalances that which may be reached, either by the public in the administration of criminal law, or by private persons in the inquiry into their rights."

"It is not essential that the communication should be made under special injunction of secrecy, or that the client should understand the extent of the privilege, but it may be with a view to professional employment, or for the purpose of obtaining professional assistance, advice or aid. It will fall within the privilege and cannot be disclosed by counsel."

McClellan vs. Longfellow, 32 Me., 494.

It makes no difference as to whether the client is a party to a suit before the Court or not. The importance of the communication to the client is not the test. It is the character of the communication.

Aiken vs. Kilburne, 27 Me. 252.

The privilege is that of the client and not of the attorney; and continues forever, unless waived by the client, and such waiver must be definite and unconditional.

Bacon vs. Frisbie, 80 N. Y., 394.

Tate vs. Tate, 75 Va., 522.

It is not extinguished by agreement or compro-

mise.

Hughes vs. Garnous, 6 Beaven, 352.
~~Turney vs. Bailey, 34 Beav., 105.~~ See also
Parker vs. Carter, 4 Munford, 273. (6 Am. Dec., 513.)
Betzhoover vs. Blackstock, 3 Watts, 20; 27 Am. Dec., 330.

The communication cannot be disclosed at any future time, nor given in evidence in another suit, although the client from whom the communications came is no party and has no interest in it.

Foster vs. Hall, 12 Pick., 89, citing
Rex vs. Withers, 2 Camb., 278.

This last case is a full discussion of the whole subject by Chief Justice Shaw. Further citation of authority on this proposition is certainly unnecessary.

We desire to say in this connection, that in raising the question as to the admissibility of the evidence of the witness Fergusson, upon the ground that it was a privileged communication, we do not question or intend to reflect in any manner upon his good faith in offering to testify. The question as to the admissibility was submitted to the Court in the absence of the jury, and we contend that the Court properly excluded it. In the case of Foster vs. Hall, supra, the Court say:

"In respect to the next question, the Court are of opinion that the testimony of Mr. Robinson was rightly rejected. Mr. Robinson very properly submitted it to the Court to detemine, upon the facts disclosed, whether he should answer or not, having no wish either to volunteer or to withhold his tes-

timony."

We respectfully submit that upon this record in this case, the judgment of the Supreme Court of New Mexico in affirming that of the District Court was proper, and that the case should be affirmed in this Court.

All of which is respectfully submitted.

WM. B. CHILDERS,
Attorney for Defendants in Error.

No. 147.

17397

Office Supreme Court U. S.
FILED
MAR 20 1901
JAMES H. MCKENNEY,
Clerk.

Certified copy of Decision filed 147 on behalf of D. E

Department of the Interior.

Filed Mar. 20, 1901.

GENERAL LAND OFFICE,
WASHINGTON, D. C., *March* 19, 1901.

I, Binger Hermann, Commissioner of the General Land Office, do hereby certify that the annexed copy, pages 1 to 11, inclusive, of Secretary's decision of August 11, 1900, and decision of this office of January 9, 1901, *in re* Henry Lockhart *v.* Fredirico J. Otero *et al.*, is a true and literal exemplification of said Secretary's decision and of the record of said office decision on file in this office.

In testimony whereof I have hereunto subscribed my name, and caused the seal of this office to be affixed, at the City of Washington, on the day and year above written.

[SEAL.]

BINGER HERMANN,
Commissioner of the General Land Office.

Vol. 27,495.—C. J. W.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *August* 11, 1900.

HENRY LOCKHART
v.
FREDIRICO J. OTERO *et al.*
} Involving Washington Lode Mining Claim, Survey No. 1034.

The Commissioner of the General Land Office:

SIR: December 21, 1898, Fredirico J. Otero and others filed application for patent to the Washington Lode Mining Claim, Survey No. 1034, Santa Fé, New Mexico. Notice of said application was duly posted and published

for the period required by law, during which time an adverse claim was filed by Henry Lockhart, upon which suit was timely instituted. A motion to dismiss the adverse claim of Lockhart was considered by the local officers and denied June 14, 1899, and appeal was taken from said action.

September 20, 1899, your office made the following finding in reference thereto:

"I find by examining the record in the case that the "Washington Mine, Survey No. 1034, is situated within "the claimed limits of the Canada de Cochiti private "land grant, reported No. 135. The claimed limits of "this grant cover over 100,000 acres. The Court of "Private Land Claims, under the Act of March 3, 1891 "(26 Stat. 854), confirmed said grant to the extent of "about 5,000 acres. The land covered by the Washing-"ton Mine, mineral application No. 86, is outside of the "limits of the grant as confirmed by the Court, but it "appears that claimants under the grant have taken an "appeal from said decree of confirmation to the Supreme "Court of the United States, where the case is still pend-"ing undetermined."

Whereupon it was held that the application for patent must remain suspended, without further action, until the matter of the adjudication of the rights of the claimants under the Canada de Cochiti private land grant is finally disposed of, and that it was unnecessary to pass upon any of the other matters raised in the appeal.

The applicants for patent moved for review of said decision, calling attention to an error of fact in reference to the statement that the decree of the Court of Private Land Claims was pending on appeal before the Supreme Court of the United States, and asking that the case proceed to adjudication upon their motion to dismiss the adverse claim filed by Lockhart.

October 25, 1899, your office considered said motion and found that there had been a misapprehension of the facts in stating that the case involving the private land grant was still pending before the United States Supreme Court when the decision of September 20, 1899, was rendered, and the statement was recalled. Another reason, however, was assigned for still declining to consider the case as presented by the appeal from the action of the local officers. It was stated that until a survey of the grant as confirmed is made under the direction of your office, and approved by the Court, the lands outside the confirmed limits are to be treated as in reservation.

The applicants for patent have appealed from your office decision, alleging that it was error to hold that the land was in any manner reserved from disposal after the entry of final decree in the United States Court of Private Land Claims, pursuant to the decision of the United States Supreme Court in said cause (167 U. S. 529).

It is evident from the final decree of the United States Court of Private Land Claims, made in pursuance of the decision of the United States Supreme Court in said cause, above cited, that the lands in question are outside the confirmed limits of the Canada de Cochiti private land grant.

It is not only conceded that said Washington Lode Mining Claim is outside the confirmed limits of the Canada de Cochiti private land grant, but it appears to be in a different township to the one in which said grant as confirmed is situated, and at least six miles from the line of said grant as indicated by the final decree fixing its limits. It was therefore error upon the part of your office to hold said lands to be in reservation on account of said grant, and so much of your office decision as so holds is vacated. It is to be observed, however, that

your office suspended action on the application for patent without considering the grounds upon which appeal was taken from the action of the local officers in denying the motion of Otero *et al.* to dismiss the adverse claim of Lockhart. This leaves the motion to dismiss said adverse claim still pending on appeal, which it is deemed best to dispose of without further delay.

It appears that at the time of the filing of the adverse claim by Lockhart he had a suit involving the land in question pending on appeal in the Supreme Court of the United States undisposed of, which suit, it is alleged, involved the same cause of action presented in said adverse claim, and has since been decided by the Supreme Court of the United States against his claim and contention. This appears to be the main ground relied upon in the motion to dismiss the adverse claim before the register and receiver.

The adverse claim filed by Lockhart and the suit instituted thereon were filed and instituted under Section 2326 of the Revised Statutes, and said suit was pending and undisposed of at the time the local officers denied the motion of Otero *et al.* to dismiss said adverse claim, and so far as the record discloses said suit is still pending. The effect of the filing of the adverse claim and of the institution of the suit upon the same was to stay all further proceedings under the application for patent until the court in which said suit was pending settled or decided the controversy or the adverse should be waived. The motion to dismiss the adverse claim was therefore properly denied by the local officers, and said motion is hereby dismissed. The stay of proceedings will be operative until proper evidence of the disposal of said case is filed with the record.

The record is remanded to your office for appropriate

action, upon the conclusion of the suit upon the adverse claim aforesaid.

Very respectfully,

THOS. RYAN,
Acting Secretary.

"N"
C. C. H.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *January* 9, 1901.

HENRY LOCKHART
v.
FREDIRICO J. OTERO *et al.*
} Quasi-Contest No. 1759. Involving Washington Lode Mining Claim.

Register and Receiver, Santa Fé, New Mexico:

SIRS: December 21, 1898, Fredirico J. Otero *et al.*, filed in your office Mineral Application No. 86, for the Washington Lode, Mineral Survey No. 1034. Notice of said application was duly given by publication and posting, and on February 28, 1899, Henry Lockhart, as claimant of the Sampson Lode, filed his adverse claim against said Mineral Application No. 86. In said adverse claim Lockhart made the usual allegations, setting forth his claim to the land embraced in said application, and in addition stating that said Washington Mine is within the exterior boundaries of a certain private land-grant called the Canada de Cochiti grant, claims for which grant were then pending and undisposed of in the courts of the United States. It was also stated that an action for the recovery of said mining claim was duly commenced by said Lockhart as plaintiff against the said applicants or their predecessors in interest as defendants, and that the same was then pending and undetermined, on appeal from

the judgment of the Supreme Court of New Mexico, in the Supreme Court of the United States.

Suit was commenced upon this adverse claim within the period fixed by the statute.

June 9, 1899, said Otero, in behalf of himself and co-claimants, filed in your office a motion to dismiss the adverse or protest filed by Lockhart, one of the grounds of the motion being that at the time of the filing of said adverse or protest a suit involving the possession of said mining claim was pending and undetermined, on appeal, in the Supreme Court of the United States, and that since the filing of said adverse by said Lockhart the said suit had been finally determined and disposed of adversely to said Lockhart, and that by reason thereof the foundation and basis of said adverse claim had been destroyed. By your decision of June 14, 1899, this motion was denied for the reason that the adverse claim filed appeared to be sufficient, and because suit thereon had been commenced in a court of competent jurisdiction. From this decision applicants appealed, and subsequently you transmitted a second appeal and other papers in the matter.

From the papers filed in the case it appeared that the suit pending in the Supreme Court of the United States at the time of the filing of the adverse herein had been finally disposed of in favor of the applicants for patent, and that judgment in the case pending before the District Court of the Territory was rendered in favor of said defendants, an appeal to the Supreme Court of the Territory being granted by the Court. The second application to purchase, from your rejection of which the second appeal was taken, was refused by you for the reason that the decision of the District Court of the Second Judicial District had not become final, and that the same was then pending upon the right of plaintiff to take an appeal.

By office letters of September 20, 1899, and October 25, 1899, this office declined to take any action upon the pending appeals, and suspended the case, for the reason that the land involved was within the claimed limits of the Canada de Cochiti private land grant, the official survey of the confirmed limits of which had not then been filed and approved by this office. No action was taken upon the matters involved in the appeals. An appeal was taken from said office decision to the Department, and under date of August 11, 1900, the Department held that it was error upon the part of this office to hold said lands to be in reservation on account of said grant, and so much of said office decision as so held was vacated. It was, however, held by the Department that the adverse claim filed by Lockhart and the suit instituted thereon were pending and undisposed of at the time that the local officers denied the motion of Otero *et al.* to dismiss said adverse claim and to accept and file their application to purchase, and that a stay of proceedings would be operative until proper evidence of the disposal of said case was filed with the record. By Departmental letter of November 10, 1900, the motion for review of said decision of August 11, 1900, was denied.

There has now been filed with the record a certificate from the clerk of the Supreme Court of the Territory of New Mexico, which shows that the adverse suit of Henry Lockhart *v.* Fredirico J. Otero *et al.*, on appeal from the District Court of Bernalillo County, New Mexico, was dismissed by said Court for the reason that the appellants had failed to perfect their appeal within the time prescribed by law.

It therefore appears that both suits involving the right of possession to the Washington Lode Mining Claim have been regularly disposed of by the courts in favor of the

applicants. This disposes of the matters in controversy between the parties on the appeal from your decision.

Under date of September 20, 1900, you forwarded to this office a protest by said Lockhart against said Mineral Application No. 86. The allegations of said protest are, that the survey on which said Mineral Application No. 86 was based was not made and the boundaries established by the United States Deputy Mineral Surveyor in accordance with the original and amended location notice of said Washington Mine, as alleged in the return of said survey, and that said claim was not made in conformity with the law, and the rules, regulations and decisions of the Land Department, in this, that the west boundary of said claim, as established under Mineral Survey No. 1034, and returned to the Surveyor-General's office by the Deputy Mineral Surveyor who executed this survey, is located at a distance of 360 feet from the center of the vein or lode within the boundaries of said Washington Claim, and therefore within the west side line of said claim 60 feet of ground more than the claimants of said claim are entitled to under the law.

The protest is corroborated by the affidavits of two other persons, and a diagram is attached to one of said affidavits which purports to show the discrepancy between the claim as located and as surveyed for patenting. The official field-notes of survey have been carefully examined, and it is there noted that lines were run from and to three of the stakes set when the last amended and additional location was made. One of the corners established by the survey is a new corner, but it appears from the official field-notes that said corner is well within the ground as originally located. It is not clear from said protest, taking into consideration the field-notes of survey on file, that more ground has been included within said

survey than is allowable under the statutes, nor that the claimants have taken ground other than that located by them. Several locations have been made of this claim since the original location, and it may be that in making their measurements the protestant and his witnesses have mistaken for corners on which the last location was based corners which belonged to some prior locations.

On the whole I do not think, giving the weight to the official field-notes to which they are entitled, that the protestant has made out an issue which calls for an investigation by this office.

The protest is accordingly dismissed.

Since the above was written there has been filed in this office, by resident counsel for the plaintiff, a copy of the "declaration," as extracted from the transcript of the record in the case of Henry Lockhart, Plaintiff in Error, *v.* J. A. Johnson, Julia Johnson, his wife, *et al.*, No. 147, October term, 1900, on file in the Supreme Court of the United States. This copy is certified by the Clerk of the Supreme Court of the United States, and from this it appears that there is now pending in said Court an action in ejectment involving said Washington Lode Mining Claim. From said copy, however, it appears that said suit was commenced in the District Court of the Second Judicial District of the Territory of New Mexico on the 21st of June, 1895, long prior to the filing of Mineral Application No. 86, by Fredirico J. Otero *et al.*, for the Washington Lode. Case No. 147 is a reinstatement of the suit formerly dismissed by the Court.

The pending suit, it would accordingly appear, is not one brought under the provisions of Section 2326, U. S. Revised Statutes, and for this reason, and the further reason that the adverse suit terminated in favor of the

applicants, this office will not further suspend action upon said mineral application because of the pending suit.

You will advise the parties hereof and in due time report.

Very respectfully,

BINGER HERMANN,
Commissioner.

17402

Supreme Court of the United States.

No. 147.—October Term, 1900.

Henry Lockhart, Plaintiff in Error,
vs.
J. A. Johnson, Julia A. Johnson, his wife, Charles Pilkey, et al.

In error to the Supreme Court of the Territory of New Mexico.

[May 13, 1901.]

This is an action of ejectment brought by plaintiff in error to recover certain mining property in the Territory of New Mexico. The declaration alleges that the plaintiff, on July 10, 1893, was entitled to the possession of a certain mine, or deposit of mineral-bearing rock in place, situated in the Cochiti mining district, in the county of Bernalillo and Territory of New Mexico, and that while so in possession the defendants, on October 1, 1893, entered into and upon the premises and have ever since withheld the possession of the same from the plaintiff to his damage. All the defendants pleaded not guilty, while Pilkey added a further plea that he was not at the time of the commencement of the action in the possession of the premises or any part thereof. The plaintiff demurred to this second plea, and after argument the demurrer was overruled. The parties went to trial upon these pleadings, and after the testimony had been taken the jury, under the instructions of the court, found a verdict for the defendants. The plaintiff appealed from the judgment entered upon the verdict to the Supreme Court of the Territory, where it was affirmed, and he thereupon sued out a writ of error from this court.

For the purpose of the trial the parties entered into the following stipulation:

"It is stipulated and agreed by and between the plaintiff and defendants in the above-entitled cause that the premises in controversy in this case are situated within the limits of private land claim reported as number 135 in the office of the surveyor general of the Territory of New Mexico, known as the Canada de Cochiti tract, as said claim was surveyed by the surveyor general, said survey having been made and approved by Clarence Pullen, surveyor general, on the date of June 29, A. D. 1885.

"It is further stipulated that said private land claim was never confirmed upon report of the surveyor general, but two petitions for the confirmation of the same were filed in the Court of Private Land Claims, one by Joel Parker Whitney, José Juan Lucero, Lauriano Lucero, Juan Cristoval Lucero, José de Jesus Lucero, Juan Teodora Lucero, José Telesforo Lucero,

Bernard S. Rodey, and Hannah Harris, being numbered 205 of the docket of the Court of Private Land Claims at Santa Fé, and filed March 2, 1893; and the other petition being filed by Manuel Hurtado and José Antonio Gallego on the 3rd day of March, 1893, and that said petitions were consolidated in said cases heard, and decree of confirmation rendered by said court on the 29th day of September, A. D. 1894, a compared copy of which decree is attached to this stipulation.

"It is further stipulated and agreed that the said premises in controversy in this case are not included within the boundaries of said grant as confirmed by said decree.

"It is further stipulated and agreed that an appeal was taken from said decree by all of the said petitioners to the Supreme Court of the United States, in which court said cause is now pending upon said appeal and undetermined, said appeal being dated the 11th day of March, A. D. 1895.

"It is further stipulated and agreed that the official printed copies of the reports of the surveyor-general to Congress upon said private land claim and all documents attached thereto may be used upon the trial of this cause to the same effect as if they were the original documents and archives on file in the surveyor general's office, subject, however, to such objection as the parties may make upon other grounds."

The plaintiff also showed upon the trial that he and one Benjamin Johnson and the defendant Charles Pilkey on or about May 7, 1893, entered into an agreement at Albuquerque, New Mexico, by which they agreed to form a partnership for the purpose of discovering, locating and operating mining claims, Pilkey agreeing to prospect and locate such veins and lodes and placers as he might discover, containing valuable ores or minerals, in the name and for the joint benefit of all the parties to the agreement, in the proportion of one-third interest to himself and an undivided two-thirds interest to the others. They were to furnish him with tools, &c., and to pay him for some portion of his labor upon the mines which he might discover. In pursuance of this agreement Pilkey started out and among others discovered, took possession of and assumed to locate the mine in question. It is claimed on the part of the plaintiff that Pilkey, after taking possession of and locating the mine, remained there from July 10, 1893, until some time in October of that year, when in connection with several other persons he entered into a conspiracy against his partners and pursuant thereto ceased to do any work on the mine and permitted other persons (defendants herein) to take possession of it and make a relocation thereof, and that they have retained possession ever since.

Evidence was offered at the trial for the purpose of showing these last stated facts, which, under the objection of the defendants, was ruled out and exceptions duly taken.

The defendants contended that the land in controversy was at all times subject to the mining laws of the United States, and that plaintiff did not comply with the provisions thereof or of the laws of New Mexico applicable

thereto, and that whatever right or title he ever had in the lands had expired and become forfeited before the defendants took possession of the land and long before the commencement of this action.

Mr. Justice PECKHAM, after making the above statement of facts, delivered the opinion of the Court.

The first question to be determined in this case is one which arises out of the facts set forth in the stipulation between the parties, and that is, Did the lands which the plaintiff claims to recover belong at the time of the location in 1893 to the United States within the meaning of section 2319, Revised Statutes, which provides that "all valuable mineral deposits in land belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States," &c.?

At the time of the location the record shows the parties believed the land was government land and not within the limits of any Mexican grant. The stipulation shows, however, that the lands were in fact within the limits of the private land claim known as the Canada de Cochiti grant; that the grant was never confirmed by Congress upon the report of the surveyor general, and that two different sets of claimants under the grant had filed their petitions in the Court of Private Land Claims at Santa Fé, one on the 2d and the other on the 3d day of March, 1893; that there was a decree of confirmation rendered by the court on September 29, 1894, and in that decree of confirmation the lands were not included within the boundaries of the grant as confirmed by that decree. An appeal was taken therefrom by all the parties to the Supreme Court of the United States, where it was pending at the time the stipulation was entered into, the appeal being dated March 11, 1895.

It therefore appears that at the time of the discovery and location of the lode in July, 1893, the Cochiti grant was before the Court of Private Land Claims for adjudication, and the question is whether by reason of that fact these lands were reserved from entry and were not subject to the mineral laws of the United States at that time. It will be noticed that before the trial of this case the validity and extent of the Cochiti grant had been decided by the Court of Private Land Claims, and this land was thereby excluded from the limits of that grant. We know by our own records that the decree of the Court of Private Land Claims was affirmed in this court, in substance, in *Whitney* v. *United States*, decided in May, 1897. (167 U. S. 529.) The contention on the part of the plaintiff in error is that while the Cochiti claim was before the Court of Private Land Claims, and thereafter until its final determination by this court, no land within its claimed limits could be entered upon under the mining laws

of the United States, and if any such entry were in fact made it was illegal and void, and gave no rights under the mining laws to the parties so entering, and consequently plaintiff's possession was not subject to forfeiture under those laws. In other words, that while the claim was *sub judice* all lands within its limits as claimed were withdrawn and reserved from entry under any of the laws pertaining to the sale or other disposition of the public lands of the United States, and that the plaintiff, being in possession, had the right to retain it as against defendants who entered without right or title, and were therefore mere trespassers.

Public lands belonging to the United States, for whose sale or other disposition Congress has made provision by its general laws, are to be regarded as legally open for entry and sale under such laws, unless some particular lands have been withdrawn from sale by Congressional authority or by an executive withdrawal under such authority, either expressed or implied. (*Wolsey* v. *Chapman*, 101 U. S. 755, 769; *Hewitt* v. *Schultz*, 180 U. S. 139.) We must, therefore, refer to the action of Congress to discover whether lands which in fact were public lands of the United States were reserved from sale or other disposition under its public laws because they were included within the claimed limits but in fact were not within the actual limits of a grant by the Spanish or Mexican authorities before the cession of the territory by Mexico to the United States by the treaty of Guadalupe Hidalgo of February 2, 1848. (9 Stat. 922.) The eighth and ninth articles of that treaty provide that the property of every kind belonging to Mexicans in the ceded territory should be respected by the government of the United States and their title recognized.

In 1854, (10 Stat. 308,) Congress established the office of surveyor general of the Territory of New Mexico, and in the eighth section of that statute it was made the duty of that officer, under instructions from the Secretary of the Interior, to ascertain the origin, nature, character and extent of all claims to lands under the laws, usages and customs of Spain and Mexico. He was to make a full report of all such claims as originated before the cession of the territory to the United States by the treaty above mentioned, with his decision as to the validity or invalidity of each. This report was to be laid before Congress for such action thereon as it might deem just and proper, "and, until the final action of Congress on such claims, all lands covered thereby shall be reserved from sale or other disposal by the government, and shall not be subject to the donations granted by the previous provisions of this act."

The Cochiti grant came before the surveyor general pursuant to the provisions of the act of 1854, and therefore by the terms of that portion of section eight, just quoted, the lands were reserved from sale or other disposal by the government until final action by Congress thereon. Up to March 3, 1891, Congress had taken no action in regard to this grant

and on that day it passed the act establishing the Court of Private Land Claims, (26 Stat. 854;) and by its fifteenth section Congress in terms repealed the eighth section of the act of 1854, "and all acts amendatory or in extension thereof, or supplementary thereto, and all acts or parts of acts inconsistent with the provisions of this act." By this repeal, lands which were in fact public lands belonging to the United States, although within the claimed limits of a Mexican grant, became open to entry and sale under the laws of the United States, unless, as is the contention of plaintiff, such lands were reserved from entry and sale or other disposition by the United States, by reason of the provisions of the treaty with Mexico. We see nothing in the terms of that treaty, either in the eighth or ninth article, that could be construed as a withdrawal of lands which in fact were the public lands of the United States, although contained within the claimed limits of some Mexican grant made prior to the cession to the United States. The mere fact that lands were claimed under a Mexican grant, when such grant did not in truth cover them, would not by virtue of any language used in the treaty operate to reserve such lands from entry and sale.

We are aware that the land department has in some cases taken a different view of this subject. In the *Tumacacori* and *Calabazas grant*, (16 L. D. 408, 423,) the Secretary held that the act of 1891, creating the Court of Private Land Claims, did not by its fifteenth section, "either by expression or necessary implication, revoke or annul the statutory reservations in force at the time of its passage."

And in the *Joseph Farr claim*, (24 L. D. 1,) the Secretary held that by the terms of the treaties between the United States and the Republic of Mexico all lands embraced within the Mexican and Spanish grants were placed in a state of reservation for the ascertainment of the rights claimed under said grants, and that the act of March 3, 1891, continued that reservation in force, and that it would remain so until final action is taken on the respective claims or grants affected thereby.

We cannot agree with these decisions. In the last case the Secretary held, in opposition to the views expressed by his predecessor in the earlier case, that the lands were not reserved by virtue of the statutory reservation under the act of 1854, because that section was repealed by the fifteenth section of the act of 1891 without any qualification, and the repeal went to the entire section; but he held that, "Whatever may have been the purpose of Congress in making said reservation, it is clear that all lands embraced within the claimed limits of grants made by Mexico or Spain prior to said treaty were in a state of reservation under the terms of the treaty itself, independent of any reservation that might be made after such treaty was duly ratified. It follows that the repeal of the section of the statute containing the reservation would not have the effect of releasing lands reserved under treaty obligations from such reservation."

As we have already stated, there are no words in the treaty with Mexico expressly withdrawing from sale all lands within the claimed limits of a Mexican grant, and we do not think there is any language in the treaty which implies a reservation of that kind. Whatever reservation there is must be looked for in the statutes of the United States, and we are of opinion that there is no such reservation and has been none since the repeal of the eighth section of the act of 1854.

In *Stoddard* v. *Chambers*, (2 How. 284,) the action was ejectment for lands in Missouri, the defendant claimed title under a New Madrid certificate permitting location upon the public lands which had been authorized to be sold under an act of Congress, approved February 15, 1811, by which the President was authorized to sell public lands in the Territory of Louisiana, with a proviso that "till after the decision of Congress thereon no tract shall be offered for sale the claim to which has been in due time, and according to law, presented to the recorder of land titles in the district of Louisiana, and filed in his office, for the purpose of being investigated by the commissioners appointed for ascertaining the rights of persons claiming lands in the Territory of Louisiana."

From the time of the passage of that act up to May 26, 1829, it was not questioned that all lands claimed under French or Spanish title were reserved from sale by acts of Congress. On May 26, 1829, this reservation ceased until it was revived by the act of July 9, 1832, and was continued from that time until the act of 1836. The defendant's patent was issued on July 16, 1832—after the time when the reservation was revived by the act of July 9, 1832. In speaking of the location under his New Madrid certificate by the defendant, the court said (at p. 318): "His location was made on lands not liable to be thus appropriated, but expressly reserved; and this was the case when his patent was issued. Had the entry been made, or the patent issued, after the 26th of May, 1829, when the reservation ceased, and before it was revived by the act of 1832, the title of the defendant could not be contested. But at no other interval of time, from the location of Bell, until its confirmation in 1836, was the land claimed by him liable to be appropriated in satisfaction of a New Madrid certificate."

So in that case it appears that unless there were a reservation of the land by Congressional action, it was not reserved in any other way, and that during the interval of three years, when the reservation by the act of Congress was not in operation, an entry made during that time would have been valid, and the title of the defendant therunder could not have been contested.

Mineral lands are not supposed to have been granted under ordinary Mexican grants of lands, and the act of 1891 provides that minerals do not pass by such grants, unless the grant claimed to effect the donation or

sale of such mines or minerals to the grantee, or unless such grantee became otherwise entitled thereto in law or in equity; the mines and minerals remaining the property of the United States, with the right of working the same, but no mine was to be worked or any property confirmed under the act of 1891 without the consent of the owner of such property, until specially authorized thereto by an act of Congress thereafter to be passed. (Section 13, subdivision third, act of 1891.) This provision makes it still plainer that, so far as regards mineral lands, there was no intention after the passage of the act of 1891 that they should be reserved by a mere claim in a Mexican grant of ordinary land.

Nor does the claim that the Cochiti grant was *sub judice* at the time of the location of these lands affect their status as public lands belonging to the United States. They were not, in fact, within the limits of the grant.

The case of *Astiazaran* v. *Santa Rita Land & Mining Company*, (148 U. S. 80,) is not in point. In that case it was held that a private claim to land in Arizona, under a Mexican grant which had been reported to Congress by the surveyor general of the territory, could not, before Congress had acted on the report, be contested in the courts of justices. It was stated (p. 83) that, "The case is one of those, jurisdiction of which has been committed to a particular tribunal, and which cannot, therefore—at least, while proceedings are pending before that tribunal—be taken up and decided by any other." The court further said that Congress having constituted itself the tribunal to finally determine upon the report and recommendation of the surveyor general whether the claim was valid or invalid, the proceedings were pending until Congress acted, and while they were pending the question of the title of the petitioner could not be contested in the ordinary courts of justice. This is no such case. There was no contest in any other court by which the validity or extent of the grant pending for decision in the Court of Private Land Claims could in any way be affected. No court of justice had been appealed to for any such purpose. The question was simply whether the land was public land open to entry under the laws of the United States, and this was a question which parties might decide at the peril of having their acts rendered of no avail if the decision of the Court of Private Land Claims included those lands in the grant then before it.

Nor does the case of *Newhall* v. *Sanger*, (92 U. S. 761,) apply. In that case it was held that lands within the boundaries of an alleged Mexican or Spanish grant which was *sub judice* at the time the Secretary of the Interior ordered a withdrawal of lands along the route of the railroad, were not embraced in the Congressional grant to the company. The decision went upon the ground that the legislation of Congress had been so shaped that no title could be initiated under the laws of the United States to lands covered by a Spanish or Mexican claim until it was barred

by lapse of time or rejected. The act of March 3, 1851, (9 Stat. 631, 633, sec. 13,) which provides for the presentation of claims under Mexican grants in California to the commission established by the act, was referred to by the court, and it was held that by reason of its provisions the lands were not public lands under the laws of the United States until the claims thereto had been either barred by lapse of time or rejected. The sixth section of the act of 1853, March 3, (10 Stat. 244, 246,) was also referred to as expressly excepting all lands claimed under any foreign grant or title. There was no such legislation existing in regard to New Mexico at the time of the location of this mining claim, July, 1893. The lands were in fact and have been since their cession to this country public lands of the United States, although during the period between the passage of the act of 1854 and that of 1891 they were not open for sale or other disposition while the claims to such lands were undetermined.

Being public land and since 1891 open to location under the mining laws of the United States, it is further contended on the part of defendants that the location of the claim made by Pilkey on July 10, 1893, in behalf of himself and his two partners, Lockhart the plaintiff herein and Johnson, became forfeited by reason of noncompliance with the mining statutes of the United States and also the Territory of New Mexico, and that while such failure to comply with the statutes continued, peaceable possession of the land was taken and a relocation made by the defendants, and whatever rights the plaintiff ever had under the first location were thereby cut off.

The laws of New Mexico in force at the time when this location was made provide that a person desiring to locate a mining claim must distinctly mark the location on the ground so that its boundaries may be readily traced, and must post in some conspicuous place on the ground a notice in writing stating the names of the locators, their intention to locate the claim, giving a description thereof by reference to some natural object or permanent monument so as to identify it, and must also within three months after such posting cause a copy of the notice to be recorded in the office of the recorder of the county in which the notice is posted. The locator must also within ninety days from the date of taking possession of the claim sink a discovery shaft upon the claim to a depth of at least ten feet from the lowest part of the rim of such shaft at the surface, exposing mineral in place, or he shall drive a tunnel, adit or open cut upon such claim at least ten feet below the surface exposing mineral in place. By the provisions of the act of 1889 the surface boundaries of all mining claims located must also be marked by four substantial posts, or four substantial monuments of stone set at each corner of the claim, and which posts or monuments must be plainly marked so as to indicate the direction of the claim from each monument or post. (Sec. 2286, Compiled Laws of N. M. 1897; secs. 1 and 2, chap. 25, Laws N. M. 1889.)

There is no pretense in the evidence that these things were done other than the posting of a notice upon a pile of rocks at some point within the claim. No work was done, no monuments or posts set, no discovery shaft sunk, nor any tunnel, adit or open cut driven, as provided by law. It also appears that some time about the last of September or the early part of October, 1893, Pilkey, who was the only one of the partners who went to the land and stayed near it at any time, left the neighborhood with his wife and came to Albuquerque and remained there until November, 1893, and that while he was absent and no one in possession of the land, and on or about October 23, 1893, four of the original defendants, Fagaly, Walker, Leeds and Johnson, located this claim and peaceably entered upon and took possession of it.

If the statutes are not complied with by doing the work as therein provided, and another locates before such work is done, it is a valid location. (*Faxon* v. *Barnard*, 4 Fed. Rep. 702; *Belk* v. *Meagher*, 104 U. S. 279, 282.)

It is undisputed that the requisite amount of work was not done by the first locator, nor is there any dispute that he left the mine, certainly early in October, 1893, and that there was no one in possession of the land on the 23d of October, 1893, when the above-named defendants entered upon the land, peaceably took possession thereof and made their location, and that in such location Pilkey did not join, and his name was absent from the notice, and he was not present when possession was taken by the other defendants.

These undisputed facts are shown by the record, and upon such evidence the court directed a verdict for the defendants. The Supreme Court of the Territory has affirmed the judgment entered upon this verdict, on the ground that the land was public land of the United States and open to location under the mineral laws thereof; that the failure of the original locator to comply with the terms of the statutes of the United States and of New Mexico by doing the work therein prescribed forfeited all his rights under such location, and the peaceable location and possession by others while such failure continued were valid, and the plaintiff therefore showed no legal title to the mine, and consequently could not recover in this action. Upon the facts thus stated we think the Supreme Court was right.

In the course of the trial, however, while the cause was with the plaintiff, he offered to show certain other and further facts which he claimed entitled him to recover the lands as against all the defendants. The defendants objected to the evidence so offered on the ground that it was inadmissible and immaterial in this action, and the objection was sustained and the plaintiff duly excepted.

The facts which the plaintiff sought to prove are briefly these: After Pilkey and the plaintiff and Johnson had entered into their agreement, and

while Pilkey was, pursuant to its provisions, engaged in prospecting, he discovered the mine in question and located it in the name of himself and his partners, and thereafter and before the expiration of the ninety days in which to do the necessary work on the claim he and the other defendants conspired together, and agreed that he should do no work on the mine within the statutory time, and after the expiration of that time and a forfeiture had been incurred by a failure to comply with the statutes the other parties defendant should relocate the mine, comply with the laws in regard to doing the work upon it and thereby obtain the ownership thereof, and that pursuant to such conspiracy he did neglect to do the necessary work within the statutory time, the defendants relocated the mine, entered into the possession thereof and did the necessary work thereon and have remained in possession ever since. The plaintiff, therefore, claims that Pilkey, being one of the conspirators with the other defendants and also a copartner of plaintiff, could not be a party to a hostile relocation of the mine, and that any such relocation by others, under an agreement with him, was illegal, and gave no right or title to defendants, and that the prior possession of plaintiff, through his copartner, continued in law, and, as against the defendants, such possession gave plaintiff a good title, they being on account of their fraud mere trespassers upon the land.

Much of the testimony thus given is denied on the part of Pilkey, but as all of it was rejected by the court we must assume its truth for the purpose of determining the case.

It is clear that the statutes providing for a location of mining lands were not complied with by Lockhart or his partners. There is no dispute on that subject. When peaceable possession of the mine which Pilkey had abandoned was taken and the relocation was made by the defendants Fagaly, Walker, Leeds and Johnson, and in their own names, whatever legal title to the mine the plaintiff Lockhart had by virtue of the prior location by defendant Pilkey was cut off. The plaintiff has now brought this purely legal action of ejectment, and must recover upon the strength of his legal title, or not at all. It is undisputed that whatever possession Pilkey had ever taken of the land in question had been in fact abandoned by him as early as the first of October, 1893. Lockhart had never had any other than constructive possession of the land based upon the alleged actual possession of his copartner, and when the latter abandoned such actual possession, left the mine and came to Albuquerque, the constructive possession of plaintiff ceased at the same moment. When the four defendants who took possession of and relocated the mine went on the land on October 23, 1893, they found it vacant, and when they took peaceable possession of the vacant land before any resumption of work upon the claim by plaintiff or in his behalf, the latter's legal title, whatever it had been, ceased. It is not a

case, therefore, of a prior possession under color of law or title being sufficient as against an ouster by a mere trespasser. There has been no ouster, but on the contrary a complete abandonment of possession. Whatever may be the equities of the plaintiff, in regard to this land as against the defendants, he has certainly no legal title to the mine or any part thereof, and in this purely legal action he must fail.

In the courts of the United States in an action of ejectment the strict legal title must prevail, and if the plaintiff have only equities they must be presented and considered on the equity side of the court. (*Foster* v. *Mora*, 98 U. S. 425, 428; *Johnson* v. *Christian*, 128 Id. 374, 382.) The law of New Mexico is to the same effect. (Compiled Laws of N. M. sec. 3160, and following sections.)

Whatever the rights of the plaintiff may be, (and as to what they are we express no opinion,) it is clear that on this record he cannot maintain an action of ejectment. If he have rights as a copartner or cotenant with Pilkey, and he claims that the acts of the latter inure to his benefit in any way, his rights under such circumstances can be enforced in equity. (*Turner* v. *Sawyer*, 150 U. S. 578, 586.)

In relation to mining, it has been held that the remedy in the case of a claim in the nature of that which the plaintiff herein sets up, is against the copartner or cotenant, by an action for a breach of his contract or to establish and enforce a trust in the claim as relocated against the parties relocating. (*Saunders* v. *Mackay*, 5 Mont. 523; *Doherty* v. *Morris*, 11 Col. 12.)

In this case it will be seen that the relocation on behalf of some of the defendants did not contain Pilkey's name, and hence he never had any legal title under that location. He denies that he had any interest in the mine under the relocation, and asserts that it was not made in his interest or for his benefit. Although the plaintiff has no right to maintain this action, yet he ought not to be embarrassed by a judgment here from pursuing any other remedy against the defendants or either of them that he may be advised; and in order to avoid any complication of that nature which possibly might result from an absolute affirmance of the judgment of the Supreme Court of the Territory, we modify the terms of that judgment by providing that it is entered without prejudice to the enforcement by other remedies, of the rights, if any, which the plaintiff may have against the parties defendant or either of them, and, as so modified, such judgment is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.